Supreme Court of the United States

OCTOBER TERM, 1965

No. 439

UNITED STATES, PETITIONER

vs.

ANTHONY GRACE & SONS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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[fol. 1]

IN THE UNITED STATES COURT OF CLAIMS

No. 133-61

ANTHONY GRACE & SONS, INC., PLAINTIFF

Against

THE UNITED STATES OF AMERICA, DEFENDANT

PETITION—Filed April 5, 1961

The Petition of Anthony Grace & Sons, Inc. respectfully shows to this Honorable Court and alleges:

1. Plaintiff, Anthony Grace & Sons, Inc. is a New York corporation with its principal office for the regular transaction of business at 151-45 6th Road, Whitestone, City and State of New York.

2. Jurisdiction is conferred upon the Court of Claims to render judgment in this action pursuant to 28 U.S. Code, Section 1491.

3. Plaintiff is a building and construction contractor who was, during the period herein set forth, qualified by experience and financial responsibility to construct housing units in accordance with the provisions of Section 403 (b) of Title IV of the Housing Amendment of 1955, as amended.

4. On or about the 1st day of September, 1958, the Defendant, through the Department of Air Force, trans-
[fol. 2] mitted to the Plaintiff certain documents, including Invitation For Bid (IFB) No. 19-603-59-15, relating to the construction of 177 Units of Capehart Family Housing at Topsham Air Force Station, Maine, designated FHA Projects Nos. 022-81015-Air 12 and 022-81016-Air

13. Said bid had as its opening date September 30, 1958, and was opened on that date.

5. In part pertinent hereto the Invitation defined the undertaking of the bidders, including this Plaintiff, in the following language:

A. "2. Sealed bids (in triplicate) for the construction through FHA insured mortgage financing of the above described total housing project, including the furnishing of all necessary labor, equipment and materials and the performing of all work, services and arrangements, in strict accordance with the terms of a Letter of Acceptability and a Housing Contract, specimen forms of each being attached hereto, will be received at *Installation Engineers Office, Attention: Topsham Monitor, Topsham A.F.B., Maine until 2:00 P.M. E.S.T. on* 30 September, 1958."

B. "1. b. When bids are received and after consultation with the Federal Housing Commissioner (hereinafter called the 'Commissioner'), the Department determines the person, partnership, firm or corporation, qualified by experience and financial responsibility, who has submitted the lowest acceptable bid."

"c. The Department issues to that bidder (hereinafter caller the 'eligible bidder') a Letter of Acceptabilty. That letter requires the eligible builder, among other things, to take four actions: first, to form 2 new corporation(s) (hereinafter called the 'mortgagor-builder'); second, to arrange financing for the cost of the total project, including profit, by Building Loan Agreements between the mortgagor-builder and mortgage lenders (hereinafter called the 'mortgagees'); third, to cause each mortgagee to [fol. 3] obtain the Commissioner's Commitment for Insurance; and fourth, to execute a three-party Housing Contract which defines the rights and obligations of the Department, the eligible builder and the mortgagor-builders. The Letter of Acceptability also requires the Department to execute a lease of a project site to each mortgagor-builder."

"d. Once the foregoing arrangements are made, the parties in interest effect a 'closing' in which the relationships of the parties are definitely established by the delivery of all legal instruments."

C. "4. . . . Should the bidder find discrepancies in, or omissions from, such Drawings and Specifications or other documents attached hereto, or should he be in doubt as to their meaning, he should at once notify the Contracting Officer, Otis Air Force Base, Massachusetts, and obtain clarification prior to submitting a bid. Information given will be transmitted to all known interested bidders. . . ."

D. "5. Under the provisions of Title IV of the Housing Amendments of 1955, as amended, the total principle [sic] amount of the mortgages is limited, among other things to the amount of the bid of the eligible builder. However, the Davis Bacon Act and Section 212(a) of the National Housing Act as amended require that wages paid to laborers and mechanics be the prevailing wage as determined by the Secretary of Labor not more than ninety (90) days prior to the commencement of construction. Since more than ninety (90) days may elapse from the date of this Invitation for Bids to the commencement of construction, the bids called for by this Invitation For Bids will include a provision for adjustment of the dollar amount therein specified to reflect any difference between the tentative minimum wage schedule attached hereto and the applicable minimum wage schedule as finally determined by the Secretary of Labor. Any such adjustment will be in an amount
[fol. 4] determined by the Commissioner to reflect such differences, and the amount of the lowest acceptable bid and the FHA estimated total replacement cost of the projects will be amended in the amount so determined by the Commissioner; except that, if such an adjustment would increase the amount of the bid above the amount of any other statutory maximum applicable to the insurable mortgages, the eligible builder will have the option of reducing his bid to such statutory maximum or of withdrawing his bid.

E. "8. Each bidder is required to submit with his bid a certified check in the amount of $25,000, payable to the Treasurer of the United States, to insure that if he is the lowest acceptable bidder for the total of 177 family housing units he will perform the necessary preliminary steps and effect a closing with FHA within the time prescribed in the Letter of Acceptability, including the furnishing of an acceptable performance and payment bond. In the event the lowest acceptable bidder fails to effect a closing with FHA within the time prescribed, his deposit will be forfeited and become the property of the Government as damages unless the Department finds that he has made every effort to effect such closing and extends the time to effect such closing. If the lowest acceptable bidder effects a timely closing with the FHA the amount of his deposit will be refunded to him 24 hours after the initial closing with FHA. . . .

"a. 'Timely Closing, as referred to in this paragraph of the Invitation For Bids and closing period as referred to elsewhere in these forms is construed to be a period of approximately 60 days from the date of opening of bids."

F. "24. Bidders are further advised that the Housing Contract will also be subject to certain other statutory provisions with respect to labor and other matters as shown in the specimen form of Housing Contract."

[fol. 5] 6. That the Contracting Officer is clearly identified as that Government officer resident at Otis Air Force Base.

7. That additional documents transmitted with said IFB included:

A. Plans and specifications prepared by Kelly & Gruzen, architects.

B. A schedule of rates of wages determined by the Secretary of Labor as applicable to the work to be performed. Said schedule is entitled, "Schedule A—Rates of Wages Predetermination No. S23,731, Date of Predeterminations June 19, 1958 Expiration Date

of Predetermination September 18, 1958". A copy of this schedule is hereto annexed and made a part hereof and designated Exhibit 1. In substance said schedule sets forth minimum rates of wages per hour for specific laborers and mechanics, including specifically designated building laborers (page 1); an apprentice schedule (page 2); hourly rates for Building Construction personnel (page 3); and Heavy and Highway Construction personnel (page 4).

C. A statement issued by the Federal Housing Administration dated August 6, 1958 entitled, "Final Appraisal and Eligibility Statement" consisting of a Schedule A and Schedule B, together with a listing of additive alternates. A copy of said statement is annexed hereto and made a part hereof and designated Exhibit 2. The aforementioned Schedule B specifically provided as follows:

> "Off-site improvements to be furnished by the Government and/or which the Government will not be reimbursed out of mortgage proceeds:
>
> (list items of off-site improvements estimated above)
>
> Certain earthwork, seeding, streets and paving, sanitary sewer and necessary additions to sewer-
> [fol. 6] age disposal system, storm drainage, manholes, headwalks, water and electrical distribution and landscaping."

D. A set of Specifications clearly segregating and defining the scope and situs of the work to be performed, namely, "Section 1 on-site, site preparation" and "Section 2 on-site, Excavation, Filling and Backfilling For Building Construction".

1. That the said Section 2 in paragraph 2-01 defines the scope of on-site work, as follows:

> "2-01 Scope
>
> (a) *Work Included.* The work covered by this section of the Specifications consists in furnishing all plant, labor, equipment and materials and in performing all operations

in connection with excavating, filling, backfilling and rough grading, complete for the building and for building utilities lines to a point five (5) feet outside the foundation line, and other related items in strict accordance with this Section of the Specifications and the applicable Drawings, and subject to the terms and conditions of the contract."

"(b) Work not Included. Clearing and grubbing, excavation, filling and grading for parking areas, roads, walks, drainage, sewers and other sub-surface utilities systems, and excavation for the building utilities beyond planes five(5) feet outside the building line are not included under this Section of the Specifications. Stripping of topsoil is specified in Section 1, Site Preparation."

8. That, on or about about September 30, 1958, Plaintiff duly submitted its bid bearing the same date in response to and in accordance with and in reliance upon the terms and conditions of said Invitation and documents related and appended thereto. Plaintiff, in its bid, offered to construct said housing and furnish the necessary serv- [fol. 7] ices connected therewith at a base price of $2,653,022.00, and to furnish certain additive alternatives at a price of $213,071.00 or a total price of $2,866,093.

9. Thereafter, by letter dated October 29, 1958, the Defendant, acting through the Department of Air Force, advised the Plaintiff that it was the "eligible bidder" and had submitted the lowest acceptable bid. This letter of the Department of Air Force and the documents referenced therein, is entitled "Letter of Acceptability" and from it emerges the contract between this Plaintiff and the Defendant. Said "Letter of Acceptability" is annexed hereto and made a part hereof, and is designed Exhibit 3.

10. That said Letter of Acceptability, provided in part as follows:

"2. Failure to perform all obligations prior to the time prescribed for closing will be just cause for cancelling all commitments undertaken with you in

connection with the housing project and for the recovery under your bid security of liquidated damages in the sum of $25,000, together with actual damages to the Department, such actual damages to be itemized and determined by the Contracting Officer, whose decision will be reduced to writing and furnished to you by mail or otherwise. Such decision shall be final and conclusive unless, within 30 days from the receipt thereof, you appeal in writing to the head of the Department or his duly authorized representative, and his decision shall, unless determined by us as necessarily to imply bad faith, or not supported a court of competent jurisdiction to have been fraudulent or capricious or arbitrary, or so grossly erroneby substantial evidence, be final and conclusive. In connection with any appeal under this paragraph you will be afforded an opportunity to be heard and to offer evidence in support of your appeal."

"6. You are required to be ready for the closing on or before January 8, 1959, and your failure to do so [fol. 8] will indicate your inability to carry out the obligations and terms of your bid and this Letter of Acceptability, provided that the Contracting Officer may extend the date of closing in writing upon your submission of written documented proof that the delay was caused by conditions beyond your control."

11. That Plaintiff duly entered upon performance of the conditions of said contract on its part to be performed, as set forth hereinabove in paragraph 5. Further, Plaintiff on or about the 19th day of November, 1958 applied for an appropriate wage determination as required under the following provision set forth in said Letter of Acceptability.

"1. n. Make aplication through the Contracting Officer, Otis A.F.B., Massachusetts, to the Secretary of Labor for an appropriate wage determination, if necessary (on a Department of Labor form DB-11, which will be supplied upon request by the Contracting Officer) for use in the construction of the project, and to furnish a copy of such wage determination

to the Contracting Officer and the Commissioner. Such wage determination will be used by the Commissioner to increase or decrease the bid price in the manner specified in your bid."

12. That the original closing date of January 8, 1959 as set forth in the Letter of Acceptability, was, by mutual consent of the parties, postponed and extended on several occasions because of conditions beyond the control of the Plaintiff and principally for the reason that Defendant was unable and unwilling and in any event, did not furnish to Plaintiff, as required by it under said Letter of Acceptability, the appropriate and final revision applicable to the final wage determination.

13. Plaintiff's repeated and successive best efforts to secure such revisions arising out of said applicable and appropriate wage determinations were unsuccessful. Conflicting rulings and interpretations arose within certain [fol. 9] agencies of the Defendant, including the Director of Federal Housing, Department of Labor and the Department of the Air Force as to the appropriate increase applicable to this agreement. Plaintiff was not a party to these conflicts and did not directly or indirectly contribute thereto.

14. That, as heretofore stated in paragraph 11, Plaintiff, after having entered into performance under said agreement, had, on the 19th day of November, 1958 made application for an appropriate wage determination. It was not until January 28, 1959 that Plaintiff received two new schedules of wage rates, each dated January 28, 1959 and expiring April 29, 1959, herein referred to as Decision 2A and 2B. A copy of said Decision 2A designated "Decision of the Secretary", U.S. Department of Labor, bears Decision No. T13 569 and is annexed hereto and made a part hereof and designated Exhibit 4. It sets forth hourly wage rates for various classifications, including "Laborers (Building)". The companion Decision, referred to as Decision 2B, bears No. T14 020 and is annexed hereto and made a part hereof and designated Exhibit 5. It sets forth wage rates for "Heavy and Highway Construction" under the subject of "Construction of Streets and Roads in connection with Capehart Housing".

A. The initial and base schedule of rates and related scope of work section of the specifications clearly covered work from the building foundation line "to a point five (5) feet outside the foundation line" (Exhibit 1). The new schedule of rates (Decision 2A, Exhibit 4) arbitrarily disregarded the five (5) feet limitation and extended the higher building construction rates to all work beyond the five (5) ft. from the foundation so as to cover all work in the proposed project except for work covering construction of the streets.

B. The companion decision 2B (Exhibit 5) similarly materially differs from the basic schedule of rates (Exhibit 1) and imposes the low rates of wages for "heavy and highway areas" on additional areas, not [fol.10] originally contemplated, namely, Section 1, Paragraph 1.14 and Sections 28 and 29 of the specifications.

15. That the revisions evidenced in said Decisions 2A and 2B (Exhibits 4 and 5) constituted a substantial change in labor rates as well as applicable areas for which the work at such rates was to be performed, materially differing from the requirements and rates spelled out in the original Invitation For Bid and the bid of the Plaintiff. Plaintiff promptly endeavored to expedite the processing of a revision of its bid price by requesting the Defendant through the Department of Air Force to request of the FHA a revised final appraisal and eligibility statement.

16. That various conferences were held between Plaintiff and the interested Departments representing the Defendant, including Department of Air Force, Department of Labor, and the Federal Housing Administration, and correspondence exchanged, all in an effort to finalize the applicable labor rates pertinent to Plaintiff's performance under its contract with the Defendant. Plaintiff was advised that it was entitled to an increase in price as a result of said Decisions 2A and 2B, as is evidenced by letter Plaintiff received from the Federal Housing Administration dated May 18, 1959, copy of which is attached hereto and made a part hereof and designated Exhibit 6.

17. That, by telegram dated March 23, 1959 the Director of the Federal Housing Administration advised the Plaintiff to prepare recalculation of price based on the new wage schedules so that same might be reviewed. Pursuant thereto, Plaintiff submitted to the FHA a schedule representing revised costs reflecting said Decisions 2A and 2B, the then current wage determinations.

18. Thereafter, conferences were held with officials of Department of Air Force and Department of Labor and flowing therefrom and in accordance therewith Plaintiff prepared a revised schedule of prices based on the current [fol. 11] Department of Labor wage rates submitting same to the FHA and Department of Air Force on or about May 14, 1959.

19. During this entire period, the closing date originally scheduled for January 8, 1959 had been adjourned from time to time and the Plaintiff expressed its desire and willingness to set a firm closing date in their letter to the Department of Air Force dated July 2, 1959 immediately upon the interested agencies within the Government resolving the appropriate increases applicable to the wage determinations pertinent to this particular contract.

20. That thereafter, through no fault of Plaintiff, but wholly through the negligence, failure and refusal of the Defendant, acting through its duly authorized representatives, Plaintiff was unable to secure the appropriate increases in said wage determinations, despite its best efforts to do so.

21. That on or about June 26, 1959 the Department of the Air Force advised Plaintiff that it would not grant any revisions in the current wage scales allowing Plaintiff additional increase in contract price.

22. That on October 1, 1959, the Department of Air Force cancelled the Letter of Acceptability theretofore entered into with Plaintiff, a copy of which letter is hereto annexed and made a part hereof and designated Exhibit 7.

23. That on October 7, 1959 Plaintiff unsuccessfully sought to continue in its performance under said agreement, which offers and opportunities were denied Plaintiff.

24. That on or about December 31, 1959 Plaintiff entered an appeal with the Armed Services Board of Contract Appeals ASBCA #6167. Said ASBCA, on June 29, 1960, dismissed Plaintiff's appeal on the ground that Plaintiff's appeal was not filed within the required 30 [fol. 12] day period from the alleged decision of the Contracting Officer. Said Board of Contract Appeals, however, did not consider any questions or matters other than the timeliness of the appeal and did not accept the Plaintiff's position that they did not recognize the particular official of the Department of Air Force as its Contracting Officer or the letter from said official as a "final decision".

25. That Defendant's arbitrary and capricious action, in direct violation of its contractual obligations, made it impossible for the Plaintiff to continue in its efforts to perform under this contract by refusing to issue the appropriate revised wage determination reflecting pertinent increases applicable to the contract. To the contrary, said Defendant wilfully and without cause unilaterally altered the scope of work provisions and sought to issue and did issue wage schedules in direct contravention of its contractual obligations.

26. That Defendant has failed, neglected and refused, without just cause, to permit Plaintiff in continuance of said agreement and that the Plaintiff has duly performed all the conditions of the said contract on its part to be performed so far as it was permitted so to do by the said Defendant.

27. The Plaintiff is ready and willing and able to perform said agreement in accordance with the terms thereof, including the wage schedules applicable to and referenced in said Letter of Eligibility theretofore granted it.

28. That Plaintiff's damages, arising out of Defendant's breach of this agreement, including sums expended by Plaintiff in its performance under the agreement prior to cancellation thereof, counsel fees, and proposed profit, together with interest and including sum deposited in the amount of $25,000, in accordance with the terms and conditions of its agreement, is in the amount of $450,000.

[fol. 13] WHEREFORE, Plaintiff demands judgment in the sum of $450,000, together with interest, costs, disbursements and legal fees.

DAVID FROMSON,
Attorney for Plaintiff
Office & P.O. Address
Franklin National Bank
Building
600 Old Country Road
Garden City, New York

[fols. 14-22] * * *

[fol. 23]

EXHIBIT 3 TO PETITION

29 OCT 1958

Gentlemen:

1. Your bid dated September 30, 1958, in the amount of $2,866,093, offering to construct through mortgage financing the housing project consisting of 177 units at Topsham Air Force Station, Maine (Invitation No. 19-603-59-15, FHA Projects Nos. 022-81015-Air 12 and 022-81016-Air-13) under Title IV of the Housing Amendments of 1955 (Public Law 345, 84th Congress), as amended, has been determined by the Department of the Air Force (hereinafter referred to as the "Department") after consultation with the Federal Housing Commissioner (hereinafter called the "Commissioner") to be the lowest acceptable bid. This acceptance of your bid price of $2,866,093 includes the construction and provision of the following Additive Alternates: No. 1 Carports; No. 2 Garbage Disposal Units; No. 3 Gutters and Downspouts; No. 4 Hardwood Floors; No. 5 Venetian Blinds; No. 6 Combination Storm and Screen Sash; No. 7 Outdoor Clothes Dryers; No. 8 TV Antenna System; No. 9 Sidewalks; No. 10 Ceramic Tile; No. 11 Landscaping; and No. 12 Landscaping. The above Additive Alternates were contained in paragraph 10 of the Invitation For Bids, as amended, and paragraph 1 of the Bid Form, and are included in the plans and specifications. Issuance of this Letter of Acceptability obligates you, at your expense and within the condition of your bid security, to:

a. Complete in conformity with the requirements of the Federal Housing Commissioner the corporate organization

ANTHONY GRACE & SONS INC.
RECEIVED
NOV 3 1958

[fol. 24] of Topsham AFB Housing, Inc., and Topsham AFB Housing No. Two, Inc., (hereinafter referred to as the "Mortgagor-Builder") in accordance with the laws of the State of Delaware, with each having a paid-in capital

stock of $1,000, cause them to be qualified to do business in the State in which the housing project is to be located, cause the mortgagor-builder to hold an immediate election of officers with authority on behalf of the mortgagor-builder to execute with the Department two leases of land from the Department, to execute the Housing Contract hereinafter referred to, and such other instruments as may be required by the Commissioner or the mortgagee.

b. Immediately following such incorporation of the two corporations and election of officers, cause the stockholders of the mortgagor-builder to execute a stock transfer and escrow agreement for each of the corporations in a form approved by the Commissioner.

c. Complete the necessary arrangements with a mortgage lender acceptable to the Commissioner as a mortgagee for financing the total cost, including your profit, of said housing project through the execution of mortgages and mortgage notes for a period of tweny-five years and bearing interests at four and one-quarter per centum per annum, with the option of prepayment without penalty at the end of fiteen years; cause the mortgagor-builder and said mortgage lender to enter into a Building Loan Agreement for each corporation, a specimen form of which is attached to the Invitation For Bids; cause said mortgage lender to apply to the Commissioner for mortgage insurance for each corporation, and take all steps necessary to cause the Commissioner to issue a Commitment for Insurance to provide insurance during and after construction of said housing project.

d. Cause the mortgagor-builder to execute in Topsham, Maine, two leases, a form of which is attached to the Invitation For Bids, with the appropriate officer of the Department.

[fol. 25] e. Make arrangements for and obtain such title insurance policies or other evidence of title, based upon the surveys of the housing project sites and the descriptions contained in the leases mentioned in the preceding subparagraphs, as may be required by such mortgagee and the Commissioner, or either of them. For this purpose, you may obtain from the Contracting Officer copies of the surveys made in connection with the Architect-Engineer contract.

f. Make all necessary arrangements with the Department or otherwise for the utility services required and be prepared at the closing (as defined in your bid) to furnish evidence in the form of written contracts or commitments that there will be made avaliable to you during the construction period at the housing project sites such utility services as will be adequate for construction.

g. Be prepared to pay or cause to be paid prior to or at the closing: (1) to the Commissioner, the filing fee, processing fee, commitment fee and initial premium for mortgage insurance during the construction period; (2) to the Contracting Officer, $60,500 representing the cost of the Architect-Engineer services for the design of the Housing Project, the inspection fee in the amount of $44,704, and the sum of $2,000 as consideration for the two leases; and (3) any other expenses incurred by the mortgagor-builder and the bidder pursuant to the Invitation For Bids and the documents thereto attached.

h. Be prepared at the closing to furnish a properly executed performance and payment bond (FHA Form 2452C, Performance Bond-Dual Obligee, FHA Form 2452CP, Payment Bond-Dual Obligee) as required pursuant to Article XIII of the form of Housing Contract attached to the Invitation For Bids.

i. Execute prior to or at the time of closing the Housing Contract and all other documents required to be executed or delivered by you at such closing.

[fol. 26] j. Cause the mortgagor-builder and the mortgagee through their duly authorized representatives prior to or at the time of closing to execute all documents required to be executed and delivered by them respectively at the closing.

k. Furnish the Air Force representative with two (2) photostatic copies of each of the FHA Commitments for Insurance and the FHA Project Analyses as soon as possible after issuance thereof, and two copies of all additional closing papers required by the Commissioner or said mortgagee.

l. Furnish prior to the closing an approved and executed Trade Payment Breakdown, FHA Form 2536, including the signature thereon of the mortgagor-builder.

m. Acknowledge in writing receipt of this letter of acceptability and attach an estimated schedule showing dates upon which you will have accomplished the several steps required above.

n. Make application through the Contracting Officer, Otis Air Force Base, Massachusetts, to the Secretary of Labor for an appropriate wage determination, if necessary, (on a Department of Labor Form DB-11 which will be supplied upon request by the Contracting Officer) for use in the construction of the project, and furnish a copy of such wage determination to the Contracting Officer and the Commissioner. Such wage determination will be used by the Commissioner to increase or decrease the bid price in the manner specified in your bid.

2. Failure to perform all obligations prior to the time prescribed for closing will be just cause for cancelling all commitments undertaken with you in connection with the housing project and for the recovery under your bid security of liquidated damages in the sum of $25,000, together with actual dawages to the Department, such actual damages to be itemized and determined by the Contracting Officer, whose decision will be reduced to writing and furnished to you by mail or otherwise. Such decision [fol. 27] shall be final and conclusive unless, within 30 days from the receipt thereof, you appeal in writing to the head of the Department or his duly authorized representative, and his decision shall, unless determined by a court of competent jurisdiction to have been fraudulent or capricious or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence, be final and conclusive. In connection with any appeal under this paragraph you will be afforded an opportunity to be heard and to offer evidence in support of your appeal.

3. All payments to the Contracting Officer shall be by certified or cashier's check made payable to the Treasurer of the United States, and all payments to the Commissioner shall be by certified or cashier's check made payable to the Commissioner of FHA, but separate checks shall be made to each, respectively.

4. This Letter of Acceptability commits the Department to execute two leases substantially in the form attached to the Invitation For Bids upon compliance by you with the provisions of subparagraph "a" hereof; and to enter into negotiations with you for any utility services to be furnished by the Department during the construction period.

5. You are required to furnish written proof satisfactory to the Contracting Officer within 30 days of the date of this Letter of Acceptability that you have a firm arrangement (1) with an acceptable financial institution to furnish the contstruction financing evidenced by the filing of an application for mortgage insurance with the Federal Housing Insuring Office; and (2) a written commitment by a qualified lender to purchase the mortgage as a long-term lender. Your failure to furnish this proof within the 30 days will be determined to be evidence that you are unable to fulfill the terms of you bid and this Letter of Acceptability and result in this Letter of Acceptability being of no further effect, provided that the Contracting Officer in writing may extend the date for furnishing the [fol. 28] information required in (1) and (2) above, upon your submission of written documented proof that the delay was caused by conditions beyond your control.

6. You are required to be ready for the closing on or before January 8, 1959, and your failure to do so will indicate your inability to carry out the obligations and terms of your bid and this Letter of Acceptability, provided that the Contracting Officer may extend the date of closing in writing upon your submission of written documented proof that the delay was caused by conditions beyond your control.

Sincerely yours,

GEORGE S. ROBINSON
Deputy Special Assistant for Installations

Anthony Grace & Sons, Inc.
151-45 6th Road
Whitestone
Queens, New York

[fols. 29-41] * * *

[fol. 42] EXHIBIT 7 TO PETITION

DEPARTMENT OF THE AIR FORCE
WASHINGTON

OFFICE OF THE SECRETARY

OCT 1 1959

Gentlemen:

1. In your letter to the Department of the Air Force dated July 2, 1959 you have indicated an unwillingness to set a closing date for your contract to build a 177 unit family housing project at Topsham Air Force Station, Maine. Paragraph 6 of the Letter of Acceptability dated October 29, 1958 required you to be ready for closing on or before 8 January 1959. The Department, at your request, has repeatedly extended this closing date in an effort to have resolved the questions raised by you pertaining to the application of certain wage rates to the construction of the project. On 26 June 1959 you were informed by letter as to the position of the Department and requested to state your position within 10 days of the date of the letter. Your reply of July 2, 1959 indicating an unwillingness to set a closing date constitutes a failure on your part to perform your obligations under your bid and under the letter of acceptability.

2. You have alleged in your letter that a failure of the Department to act promptly in this matter has caused the long delay in resolving the questions of applicable wage rates. In this connection, your attention is directed to the fact that your request for a determination of the position of the Air Force was not made until 29 May 1959, over four months subsequent to the date when you were required to be ready for closing.

[fol. 43] 3. Accordingly, pursuant to paragraph 2 of the letter of acceptability, the Department hereby cancels all commitments undertaken with you in connection with

the housing project, reserving all its rights with respect to the recovery of damages.

Sincerely,

GEORGE S. ROBINSON
Deputy Special Assistant for Installation

Anthony Grace & Sons, Inc.
151-45 6th Road
Whitestone
Queens, New York

CC: S. Locurto
I. Monforte
S. Pollack
File

[fol. 44]

IN THE UNITED STATES COURT OF CLAIMS

No. 133-61

[Title Omitted]

DEFENDANT'S ANSWER—Filed July 19, 1961

Defendant, in answer to the petition filed herein, admits, denies, and alleges as follows:

1. Denies the allegations of paragraph 1 for lack of information and knowledge sufficient to form a belief as to the truth thereof.

2. Alleges that the allegations of paragraph 2 are ones of law not requiring answer.

3. Admits the allegations contained in paragraph 3.

4. Admits the allegations contained in paragraph 4 except as to the date the Air Force transmitted certain documents and the Invitation for Bids to the plaintiff, which defendant denies for lack of information and [fol. 45] knowledge of defendant's attorneys sufficient to form a belief as to the truth thereof; avers that the Invitation was dated August 22, 1958.

5. Admits that the paragraphs quoted, insofar as they are correctly quoted, are part of the aforesaid Invitation for Bids but alleges that they are not quoted in sequence, that the paragraphs quoted do not constitute all of the pertinent portions thereof, that reference to the whole instrument and the documents annexed thereto is necessary for an understanding thereof, and that the document speaks for itself.

6. Admits the allegations contained in paragraph 6. [In only one place is any reference made to contracting officer, *i.e.*, paragraph 4 quoted by plaintiff at p. 3.]

7. Admits that the documents listed by plaintiff in paragraph 7, among others, accompanied the Invitation for Bids; insofar as said quotations by plaintiff in the exhibits attached to its petition conform to the Bid documents, admits them and insofar as they do not conform to the Bid documents, denies them; alleges further that said documents speak for themselves.

8. Admits the allegations contained in paragraph 8.

9. Admits the allegations contained in the first and third sentences of paragraph 9; admits the allegations of the second sentence down to and including the words "Letter of Acceptability" but denies that there emerged a contract between plaintiff and defendant as a result thereof; answering further, defendant avers that the [fol. 46] conditions enunciated in the Letter of Acceptability constituted conditions precedent to the housing contract, that plaintiff never agreed to or effected a closing of said contract and that in accordance with paragraph 6 thereof the Letter of Acceptability was withdrawn; defendant further alleges that the failure to effect a closing of the contract was due to plaintiff's own fault.

10. Admits that the paragraphs quoted from the Letter of Acceptability in paragraph 10 appear in said Letter and insofar as said quotations conform to the aforementioned document admits them and insofar as they do not conform to the aforementioned document, denies them; alleges further that said Letter of Acceptability speaks for itself.

11. Admits that plaintiff entered upon performance of the conditions precedent to the contract and that plaintiff applied for a wage determination but avers that plaintiff refused to accept the applicable wage determinations issued by the Department of Labor.

12. Denies the allegations in paragraph 12, except admits that the original closing date of January 8, 1959, was postponed and extended on several occasions but avers that such postponements and extensions were because of plaintiff's refusal to accept the appropriate wage determinations furnished and because FHA determined that application of the interpretation of the wage determinations by plaintiff would result in a mortgage in excess of the statutory limit set forth in Section 803(b) (3) (B) of the National Housing Act (12 U.S.C. 1748b).

[fol. 47] 13. Denies the allegations contained in paragraph 13, except admits that the wage revisions were not consummated because of plaintiff's repeated refusals to accept applicable wage determinations issued by the Department of Labor as interpreted by FHA and the Department of the Air Force; by way of further answer defendant avers that plaintiff delayed submitting necessary information to process the application for mortgage insurance and required fees.

14. Admits that the plaintiff made application for appropriate wage determinations and that, on January 28, 1959, plaintiff received two new schedules of wage rates; denies the remaining allegations on the ground that they constitute conclusions of law.

15. Denies the allegations of the first sentence of paragraph 15; avers that the Government attorneys lack sufficient information and knowledge sufficient to form a belief as to the truth of the allegations of the second sentence and they are therefore denied.

16. Admits the allegations contained in paragraph 16 except avers that the date of the FHA letter referred to in the second sentence was March 18, 1959, not May 18, 1959.

17. Admits that by telegram dated March 23, 1959, the Director of the Federal Housing Administration requested that plaintiff submit an amended application and figures and advised that the entire situation would be reviewed; avers that defendant's attorneys lack sufficient information and knowledge sufficient to form a belief as to whether said application and figures were submitted.

[fol. 48] 18. Admits that conferences were held with offficials of the Department of Air Force and Labor but denies the remaining allegations for lack of information and knowledge of counsel for the defendant.

19. Admits that the original closing date of January 8, 1959, had been extended from time to time but, except as so admitted, denies all remaining allegations and specifically denies that the referenced letter of July 2, 1959, indicated a desire and willingness to set a firm closing date.

20. Denies the allegations in paragraph 20; answering further, defendant alleges that defendant was willing at all times pertinent hereto to issue a revision in the contract price based on the applicable wage determinations but that plaintiff refused to accept the applicable wage increases offered by the FHA in accordance with law.

21. Denies the allegations contained in paragraph 21 and, answering further, alleges that on June 26, 1959, the Department of the Air Force advised plaintiff that it did not concur in plaintiff's position regarding justification for an increase in the contract price and in the same letter asked plaintiff for advice as to whether it intended to effect a closing.

22. Admits the allegations of paragraph 22 but alleges further that plaintiff failed to perform its obligations under the Letter of Acceptability by refusing to close the contract, causing the defendant, a year after the opening of bids, to withdraw said Letter of Acceptability.

23. Denies the allegations contained in paragraph 23. [fol. 49] 24. Admits the allegations contained in paragraph 24.

25. Denies the allegations of paragraph 25.

26. Denies the allegations of paragraph 26.

27. Denies the allegations of paragraph 27.

28. Denies that plaintiff is entitled to the amount sought or to any other amount or to any other relief and denies that defendant breached its agreement or is indebted to plaintiff for the sum claimed or for any other sum. Defendant affirmatively alleges that the retention by it of the $25,000.00 was in accord with the provisions of the Letter of Acceptability and constituted reasonable liquidated damages.

29. Denies each and every allegation not hereinbefore expressly admitted, denied, or qualified.

AFFIRMATIVE DEFENSE

30. Defendant alleges that plaintiff's failure to file a timely appeal after the withdrawal by the Air Force of the Letter of Acceptability constitutes a failure to exhaust avaliable administrative remedies and, further, that plaintiff has also failed to avail itself of adminis-

trative remedies dealing with the problem of minimum wage rates in that it failed to seek withdrawal of its bid and release, as provided for, when escalation raised the per unit price of Capehart housing above the statutory maximum.

[fol. 50] WHEREFORE, defendant prays for dismissal of the petition.

WILLIAM H. ORRICK, JR.
Assistant Attorney General
Civil Division

DAVID ORLIKOFF
Attorney, Civil Division
Department of Justice

MARY J. TURNER
Attorney, Of Counsel
Department of Justice

[fol. 51]

IN THE UNITED STATES COURT OF CLAIMS

No. 133-61

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* * * *

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT—
Filed October 18, 1963

[Omitted in printing]

[fol. 51-A]

EXHIBIT A TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (EXCERPTS)

ARMED SERVICES BOARD OF
CONTRACT APPEALS
WASHINGTON, D. C.

ASBCA No. 6167

Appeal of—

Anthony Grace & Sons, Inc.
Under Invitation No. 19-603-59-15,
dated 22 August 1958, and

Letter of Acceptability,
dated 29 October 1958

APPEARANCES FOR THE GOVERNMENT:

BRIGADIER GENERAL A. W. RIGSBY, USAF
Chief Trial Attorney

WILBUR J. SMOLKA, Esq.
Trial Attorney

APPEARANCES FOR THE APPELLANT:

SALVATORE A. LOCURTO, Esq.

ON MOTION TO DISMISS

The instant contract, which became operative upon dispatch by the Government of the Letter of Acceptability described above, related to the construction of 177 units of Capehart Family Housing at Topsham Air Force Station, Maine.

In the covering letter by which the cited Invitation was forwarded appellant was notified that "The following listed documents are applicable to this project and are furnished for your information and use: (Bidders' Check List is also enclosed)

"a. INVITATION FOR BIDS (IFB) 19-603-59-15

* * * *

"c. Letter of Acceptability

* * * *

"i. Department of Labor Wage Determination No. S 23,731

* * * *"

The opening portion of the Invitation also notified appellant that:

"1. a. The Department of the Air Force (hereinafter called the 'Department') issues an Invitation [fol. 51-B] For Bids and receives bids.

"b. When bids are received and after consultation with the Federal Housing Commissioner (hereinafter called the 'Commissioner'), the Department determines the person, partnership, firm or corporation, qualified by experience and financial responsibility, who has submitted the lowest acceptable bid.

"c. The Department issues to that bidder (hereinafter called the 'eligible builder') a Letter of Acceptability. That letter requires the eligible builder, among other things, to take four actions: first, to form 2 new corporation(s) (hereinafter called the 'mortgagor-builder'); second, to arrange financing for the cost of the total project, including profit, by Building Loan Agreements between the mortgagor-builder and mortgage lenders (hereinafter called the 'mortgagees'); third, to cause each mortgagee to ob-

tain the Commissioner's Commitment for Insurance; and fourth, to execute a three-party Housing Contract which defines the rights and obligations of the Department, the eligible builder and the mortgagor-builders. The Letter of Acceptability also requires the Department to execute a lease of a project site to each mortgagor-builder.

"d. Once the foregoing arrangements are made, the parties in interest effect a 'closing' in which the relationships of the parties are definitely established by the delivery of all legal instruments. Among other things at the closing, each mortgagor-builder delivers to its mortgagee a note and mortgage with an amortization period of 25 years (with the option of pre-payment without premium at the end of 15 years) and bearing interest at not to exceed four and one quarter (4¼) per centum per annum, and the eligible builder deposits in escrow with the mortgagees the capital stock of the newly formed mortgagor-builder corporations for ultimate delivery to the Department, in accordance with the escrow agreements.

* * * *"

In part pertinent hereto the Invitation went on to define appellant's undertaking in the following language:

"2. Sealed bids (in triplicate) for the construction through FHA insured mortgage financing of the above described total housing project, including the furnishing of all necessary labor, equipment and materials and the performing of all work, services and arrangements, in strict accordance with the terms of a Letter of Acceptability and a Housing Contract, specimen forms of each being attached hereto, will be received at Installation Engineers Office, attention: Topsham Capehart Monitor, Top-
[fol. 51-C] sham AFS, Maine until 2:00 P.M. EST on 30 September 1958.

* * * *

"4. The bidder should carefully examine the provisions of the form of Housing Contract attached

hereto, including the Drawings and Specifications made a part thereof; visit the site of the housing projects; and fully inform himself as to all conditions and matters which can in any manner affect the financing of the construction and the constructing of the housing projects or their cost. Should the bidder find discrepancies in, or omissions from, such Drawings and Specifications or other documents attached hereto, or should he be in doubt as to their meaning, he should at once notify the Contracting Officer, Otis Air Force Base, Massachusetts, and obtain clarification prior to submitting a bid. Information given will be transmitted to all known interested bidders.

"5. Under the provisions of Title IV of the Housing Amendments of 1955, as amended, the total principle [sic] amount of the mortgages is limited, among other things to the amount of the bid of the eligible builder. However, the Davis Bacon Act and Section 212(a) of the National Housing Act as amended require that wages paid to laborers and mechanics be the prevailing wage as determined by the Secretary of Labor not more than ninety (90) days prior to the commencement of construction. Since more than ninety (90) days may elapse from the date of this Invitation For Bids to the commencement of construction, the bids called for by this Invitation For Bids will include a provision for adjustment of the dollar amount therein specified to reflect any difference between the tentative minimum wage schedule attached hereto and the applicable minimum wage schedule as finally determined by the Secretary of Labor. Any such adjustment will be in an amount determined by the Commissioner to reflect such differences, and the amount of the lowest acceptable bid and the FHA estimated total replacement cost of the projects will be amended in the amount so determined by the Commissioner; except that, if such an adjustment would increase the amount of the bid above the amount of any other statutory maximum applicable to the insurable mortgages, the eligible builder will

have the option of reducing his bid to such statutory maximum or of withdrawing his bid.

* * * *

"8. Each bidder is required to submit with his bid a certified check in the amount of $25,000, payable [fol. 51-D] to the Treasurer of the United States, to insure that if he is the lowest acceptable bidder for the total of 177 family housing units he will perform the necessary preliminary steps and effect a closing with FHA within the time prescribed in the Letter of Acceptability, including the furnishing of an acceptable performance and payment bond. In the event the lowest acceptable bidder fails to effect a closing with FHA within the time prescribed, his deposit will be forfeited and become the property of the Government as damages unless the Department finds that he has made every effort to effect such closing and extends the time to effect such closing. If the lowest acceptable bidder effects a timely closing with the FHA the amount of his deposit will be refunded to him 24 hours after the initial closing with FHA. The deposits of unsuccessful bidders will be returned to them not later than 60 days after the opening of the bids. Each prospective bidder is advised that the failure to submit such certified check with his bid will render his bid defective and will be cause for its rejection.

"a. 'Timely Closing' as referred to in this paragraph of the Invitation For Bids and closing period as referred to elsewhere in these forms is constured to be a period of approximately 60 days from the date of opening of bids.

* * * *

"24. Bidders are further advised that the Housing Contract will also be subject to certain other statutory provisions with respect to labor and other matters as shown in the specimen form of Housing Contract.

* * * *"

The cited Letter of Acceptability, which presumably conformed to the specimen letter attached to the Invitation and which notified appellant that its bid had been accepted, contained the following stipulation:

> "2. Failure to perform all obligations prior to the time prescribed for closing will be just cause for cancelling all commitments undertaken with you in connection with the housing project and for the recovery under your bid security of liquidated damages in the sum of $25,000, together with actual damages to the Department, such actual damages to be itemized and determined by the Contracting Officer, whose decision will be reduced to writing and furnished to you by mail or otherwise. Such decision shall be final and conclusive unless, within 30 days from the receipt thereof, you appeal in writing to the head of the Department or his duly authorized representative, and his decision shall, unless determined by a court of competent jurisdiction to have [fol. 51-E] been fraudulent or capricious or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence, be final and conclusive. In connection with any appeal under this paragraph you will be afforded an opportunity to be heard and to offer evidence in support of your appeal."

As lowest acceptable bidder under the Invitation appellant had of course posted a bid deposit with the Government in the sum of $25,000.00 as required. Following receipt of the Letter of Acceptability a dispute arose between the parties which, to the limited extent revealed in the arguments made at the hearing of this motion, exclusively concerned itself with the application and effect of certain wage determinations rendered by the Secretary of Labor. As a result of the disagreement "the closing", hereinbefore mentioned and stipulated originally to take place on or before 8 January 1959, was postponed until a later date. Neither passage of time nor ensuing discussions served to smooth the way to unanimity of opinion with the result that by letter dated 1 October 1959 the Government advised appellant as follows:

"Gentlemen:

"1. In your letter to the Department of the Air Force dated July 2, 1959 you have indicated an unwillingness to set a closing date for your contract to build 177 unit family housing project at Topsham Air Force Station, Maine. Paragraph 6 of the Letter of Acceptability dated October 29, 1958 required you to be ready for closing on or before 8 January 1959. The Department, at your request, has repeatedly extended this closing date in an effort to have resolved the questions raised by you pertaining to the application of certain wage rates to the construction of the project. On 26 June 1959 you were informed by letter as to the position of the Department and requested to state your position within 10 days of the date of the letter. Your reply of July 2, 1959 indicating an unwillingness to set a closing date constitutes a failure on your part to perform your obligations under your bid and under the letter of acceptability.

"2. You have alleged in your letter that a failure of the Department to act promptly in this matter has caused the long delay in resolving the questions of applicable wage rates. In this connection, your attention is directed to the fact that your request for a determination of the position of the Air Force was not made until 29 May 1959, over four months subsequent to the date when you were required to be ready for closing.

[fol. 51-F] "3. Accordingly, pursuant to paragraph 2 of the letter of acceptability, the Department hereby cancels all commitments undertaken with you in connection with the housing project, reserving all its rights with request to the recovery of damages."

The above letter of 1 October 1959 was signed by The Deputy Special Assistant For Installations, Office of the Secretary of the Air Force, the same official who in keeping with normal practice previously signed the Letter of Acceptability by which appellant's low bid was accepted by the Government.

Under date of 7 October 1959 appellant, through counsel, addressed that official in a letter which read:

"Dear Sir:

"Receipt is hereby acknowledged of your letter dated October 1st, 1959, wherein you have advised me and my client, Anthony Grace & Sons, Inc., that the Department of the Air Force has cancelled its committment [sic] in connection with the above referred to Housing Projects.

"My client has never indicated an unwillingness to set a closing date, as alleged in your letter, but rather has made all possible efforts to cooporate with your Department.

"An examination of your files will indicate that there is correspondence dated as early as November, 1958, countless trips to Washington and Maine, and many conferences with the FHA Bangor, Maine, Department of Labor, Washington, D. C., and the offices of Lt. Col. Wayne R. Pipher and Col. Goddard.

"In addition thereto the necessary Delaware corporations were organized and the certificates filed in Delaware on January 12th, 1959, and the same qualified in Maine on March 10th, 1959. It was the failure to your office to apply the Wage Determinations, as issued by the Department of Labor prior to closing that gave rise to the existing problems. In addition thereto, a notice of cancellation was not sent out by the Air Force until my letter dated September 22nd, 1959, inquiring as to the status of the subject Housing Project, was received by your office.

"Throughtout all this time you have held my client's bid check in the sum of $25,000.00, and I am therefore requesting that the bid check be returned to my client, Anthony Grace & Sons, Inc., immediately upon receipt of this letter.

[fol. 51-G] "I am also advising you that my client, Anthony Grace & Sons, Inc., is reserving all of its rights with respect to recovery of damages due to the failure of the Department of the Air Force to comply with all of the bid instructions and regulations thereby creating the situation that exists."

In response the Deputy Special Assistant for Installations advised appellant's counsel as follows:

"19 October 1959

"Dear Mr. Locurto:

"I have your letter of 7 October 1959, requesting the return of the $25,000 check deposited by your client, Anthony Grace & Sons, Inc., as security for its bid on the Topsham project. Since the Department's cancellation of its commitments was compelled by your client's repeated refusals to perform its obligations under its bid and the Letter of Acceptability, with the result that it was necessary to revise the plans and rebid the project, the return of the bid security would be manifestly improper. Your request must therefore be denied."

The most the Government is able to say with regard to appellant's receipt of the Government's letter of 19 October 1959 is that it was released on 20 October 1959, for dispatch to U. S. Post Office channels and ultimate delivery to the addressee. It would appear however that for some unknown reason the letter never reached the hands of appellant's counsel. Prompted by a concern that his letter of 7 October 1959 was still unanswered appellant's counsel made inquiry by telephone on 4 December 1959; a copy of the letter of 19 October 1959 was furnished him by mail on 8 December 1959. Shortly thereafter the following notice of appeal was filed:

"Dear Mr. Douglas:

"As counsel for Anthony Grace & Sons, Inc., I have been requested to appeal the decision of Mr. George S. Robinson dated October 1st, 1959.

"On October 7th, 1959, I formally appealed the decision in Robinson's letter dated October 1st, 1959 and in my reply requested the return of my client's bid deposit check and also set forth facts in contradiction to Mr. Robinson's allegations. Hearing nothing further, on December 4th, 1959, I called the office of the Department of the Air Force, and spoke with Mr. Samuel Hanenberg concerning a reply to my

appeal dated October 7th, 1959. I thereafter, on December 9th, 1959, received a letter from Mr. Han-
[fol. 51-H] enberg wherein he furnished me with a copy of a reply sent to my office by Mr. Robinson on October 19th, 1959. This letter was never received by my office.

"You are hereby notified of my intention to appeal the decision of Mr. Robinson to withdraw and cancel the Letter of Acceptability dated October 29th, 1958 and his refusal to return the $25,000.00 bid deposit. I am of the opinion that the facts and circumstances as set forth in my letter forwarded to Mr. Robinson on October 7th, 1959, clearly sets forth that the delays caused by the Government Agencies involved made it impossible for the builder to comply with the terms of the Letter of Acceptability.

"In view of the aforementioned, the Letter of Acceptability should have been terminated for the convenience of the Government and the $25,000.00 bid deposit returned to Anthony Grace & Sons, Inc.

"I request that this Notice of Appeal, as previously set forth in my letter dated October 7th, 1959 be processed in accordance with the Rules of the Armed Services Board of Contract Appeals. Upon receipt of Notice of Docketing I will file a formal Bill of Complaint.

"I sincerely request that this appeal be expedited in order that a hearing be held at the earliest possible date."

After the foregoing notice was forwarded appellant also received a letter from the procurement contracting contracting officer, who was stationed at Otis Air Force Base, Massachusetts, the installation responsible for the issuance of the Invitation cited above. The letter, dated 22 December 1959, was as follows:

"Gentlemen:

"Reference is made to letter dated 1 October 1959 addressed to you and letter addressed to Salvatore A. Locurto, Esq., dated 1 October 1959, both signed by Mr. George S. Robinson, Deputy Special Assistant for Installations and both in regard to cancellation

of all commitments undertaken with you in connection with the Capehart Housing Project at Topsham Air Force Station, Maine. Mr. Robinson was acting in my behalf and I agree with the action taken by him in this matter."

The Government has moved that the appeal be dismissed upon the ground that there is no timely appeal before the Board. It argues that the requirements of a decision and an appeal were exclusively fulfilled by the Government's letter of 1 October 1959 and appellant's 16 December [fol. 51-I] 1959 appeal notice respectively; and that since the interval between receipt of the former and filing of the latter is in excess of thirty days no jurisdiction attaches.

Although it raises other grounds, appellant argues for denial of the motion principally on the ground that the only correspondence which constituted an appealable decision was the letter dated 19 October 1959; and inasmuch as that letter was not received until 8 December 1959 appeallant's appeal notice of 16 December 1959 was more than adequate to vest the Board with jurisdiction. An examination of appellant's letter of 16 December 1959 reveals that the argument appellant now advances in connection with the motion represents a complete departure from the position taken when the letter was written. On 16 December 1959 appellant unequivocally labelled the Government's letter of 1 October 1959 as the "decision" and the reply thereto of 7 October 1959 as "my appeal". For reasons hereinafter set forth we are persuaded that appellant's characterization was correct in the instance of the first letter and incorrect with respect to the second.

Appellant likewise suggests that the Deputy Special Assistant for Installations who signed the Government's 1 October 1959 letter was not the contracting officer for the purposes of a decision rendered pursuant to the "disputes clause" of the Letter of Acceptability; and in this regard points to the letter written to appellant by the contracting officer, Otis Air Force Base, under date of 22 December 1959. If we were to accept appellant's suggestion it would be necessary to ignore undisputed evi-

dence that the Deputy Special Assistant for Installations was the Government's representative in all dealings of legal consequence between the parties. The Otis Air Force Base contracting officer was at all times a virtual stranger to appellant. On the other hand, the Deputy Special Assistant for Installations signed the Invitation upon which appellant bid; signed the Letter of Acceptability, the letter of 1 October 1959, and the letter of 19 October 1959 which appellant now claims forms the basis of a timely appeal; and at all times headed the office with which appellant dealt in connection with the contract. Appellant nowhere alleges that the presence of the signature of the Deputy Special Assistant for Installations on the 1 October 1957 letter misled appellant with regard to its right of appeal. Indeed the record shows quite the contrary. As indicated by argument upon the motion, appellant did not question the Government's 1 October 1959 letter on the ground that its signatory was the Deputy Special Assistant for Installation but rather because in appellant's view "issues" were not reached until appellant received the 19 October 1959 letter wherein the Government refused to return appellant's bid deposit.

As has just been intimated, appellant also implies that the Government's 1 October 1959 letter was not a final decision because "an actual issue" between the parties had not yet been reached. Even a hurried reading of the letter demonstrates that contention is worthy of no consideration. What could have more finality than a letter [fol. 51-J] which told appellant insofar as the instant contract is concerned that "the Department hereby cancels all commitments undertaken with you in connection with the housing project * * *"?

The parties are in complete agreement that it was and is their mutual interpretation that in the event a timely appeal is taken thereunder the "disputes paragraph" of the Letter of Acceptability confers jurisdiction on the Board to review a decision relating to cancellation of commitments, withholding of bid security, and itemization and determination of actual damages. The Government's letter of 1 October 1959 is such a decision. That appellant so understood it is established by the contents of the open-

ing paragraph of the letter appellant wrote on 7 October 1959. The latter however falls short of meeting the requirements of a notice of appeal. Although it mentions that appellant "is reserving all of its rights with respect to recovery of damages due to the failure of the Department of the Air Force to comply with all of the bid instructions and regulations thereby creating the situation that exists", in the circumstances here present it would be unjust to read into that language a declaration of a then present intent on appellant's part to invoke the right of appeal. Appeal of *Reading Clothing Manufacturing Co.*, ASBCA No. 3912, 57-1 BCA 1290, 7 May 1957. That the foregoing conclusion is the correct one and that appellant itself did not on 7 October 1959 consider that it was declaring such an intent is evidenced by appellant's account of the reason why it made a telephonic inquiry on 4 December 1959. As stated by appellant during argument on the instant motion, the sole purpose of the 4 December telephone call was to obtain information as to why the Government had not furnished "an answer" to appellant's 7 October letter. If appellant on 4 December 1959 (or previously) considered its 7 October 1959 letter to be a notice upon the Government that an appeal would be forthcoming, no inquiry into the matter of "an answer" would have been instituted because no reply could have reasonably been expected.

With respect to the argument that 8 December 1959 is the critical date exclusively determinative of appellant's right to be heard on the merits of the controversy (first raised in oral argument and written memorandum submitted in connection with the instant appeal) our hereinbefore expressed conclusion that the Government's 1 October 1959 letter was an appealable, final decision requires that we go no further than decide whether the Government, during the thirty day period following the letter's receipt by appellant, agreed to reconsider the decision therein contained. No such agreement is asserted and we find none in the record before us. Since there is no evidence that the Government ever assented to reconsideration of the 1 October 1957 decision, appellant's appeal to be timely should have been filed within thirty

days of 7 October 1957, the date which the record shows beyond peradventure of a doubt to be the date on which appellant was in receipt of the decision.
[fol. 51-K] In accordance with the foregoing the Government's motion is granted and the appeal is dismissed.

Dated 29 June 1960.

/s/ Henry F. Mlotkowski,
HENRY F. MLOTKOWSKI,
Lt. Colonel, USAF
Member of Division No. 3,
Air Force Contract Appeals Panel

I Concur

/s/ George W. Crawford
GEORGE W. CRAWFORD
Chairman of the Air Force Contract
Appeals Panel and Member of
Division No. 3

DONALD W. NOFRI,
Lt. Colonel, USAF
Member of Division No. 3,
Air Force Contract Appeals Panel,
did not participate in this decision.

I certify that the foregoing is a true copy of the findings of fact, decision and views of the Air Force Contract Appeals Panel of the Armed Services Board of Contract Appeals in ASBCA No. 6167, appeal of Anthony Grace & Sons, Inc., under Invitation No. 19-603-59-15, dated 22 August 1958 and Letter of Acceptability, dated 29 October 1958. I further certify that there has been filed with the Recorder a statement by the Chairmen of the respective Panels of the Board that they have reviewed on behalf of their respective Services the above-captioned decision of the Air Force Contract Appeals Panel and that in their opinion further, formal and exclusive decision by the three Panel Chairmen is not required.

Dated

GEORGE L. HAWKES, Recorder
Armed Services Board of
Contract Appeals

[fol. 51-L]

October 7th, 1959

Mr. George S. Robinson, Deputy Special
Assistant for Installations
Department of the Air Force
Temporary Building 8
39th Street and Newark Street N W
Washington, D. C.

RE: Topsham Air Force Station
FHA Project Nos. 022-8105
and 022-8106

Dear Sir:

Receipt is hereby acknowledged of your letter dated October 1st, 1959, wherein you have advised me and my client, Anthony Grace & Sons, Inc., that the Department of the Air Force has cancelled its committment in connection with the above referred to Housing Projects.

My client has never indicated an unwillingness to set a closing date, as alleged in your letter, but rather has made all possible efforts to cooperate with your Department.

An examination of your files will indicate that there is correspondence dated as early as November, 1958, countless trips to Washington and Maine, and many conferences with the FHA Bangor, Maine, Department of Labor, Washington, D.C., and the offices of Lt. Col. Wayne R. Pipher and Col. Goddard.

In addition thereto the necessary Delaware corporations were organized and the certificates filed in Delaware on January 12th, 1959, and the same qualified in Maine on March 10th, 1959. It was the failure to your office to apply the Wage Determinations, as issued by the Department of Labor prior to closing that gave rise to the existing problems. In addition thereto, a notice of cancellation was not sent out by the Air Force until my letter dated September 22nd, 1959, inquiring as to the status of the subject Housing Project, was received by your office.

[fol. 61-M]

Mr. George S. Robinson October 7th, 1959

Throughout all this time you have held my client's bid check in the sum of $25,000.00, and I am therefore requesting that the bid check be returned to my client, Anthony Grace & Sons, Inc., immediately upon receipt of this letter.

I am also advising you that my client, Anthony Grace & Sons, Inc., is reserving all of its rights with respect to recovery of damages due to the failure of the Department of the Air Force to comply with all of the bid instructions and regulations thereby creating the situation that exists.

Very truly yours,

SALVATORE A. LOCURTO

S
A : VT
L

cc: Lt. Col. Anderson, Maj. Gen. M. R. Tidwell, Jr.

[fol. 51-N]

DEPARTMENT OF THE AIR FORCE
WASHINGTON

OFFICE OF THE SECRETARY

19 October 1959

Dear Mr. Locurto:

I have your letter of 7 October 1959, requesting the return of the $25,000 check deposited by your client, Anthony Grace & Sons, Inc., as security for its bid on the Topsham project. Since the Department's cancellation of its commitments was compelled by your client's repeated refusals to perform its obligations under its bid and the Letter of Acceptability, with the result that it was necessary to revise the plans and rebid the project, the return of the bid security would be manifestly improper. Your request must therefore be denied.

Sincerely yours,

/s/ George S. Robinson
GEORGE S. ROBINSON
Deputy Special Assistant for Installations

Mr. Salavatore A. Locurto
391 East 149th Street
Bronx 55, New York

cc: Major General M. R. Tidwell, Jr.
Lt. Colonel J. B. Anderson

[fol. 51-O]

DEPARTMENT OF THE AIR FORCE
WASHINGTON

OFFICE OF THE SECRETARY

7 Dec 1959

Dear Mr. Locurto:

During our telephone conversation on December 4, 1959, you stated that the Air Force had not replied to your letter of October 7, 1959, with respect to the Topsham Air Force Station Capehart Project. Inclosed for your information is a copy of a letter to you dated October 19, 1959, from Mr. George S. Robinson, Deputy Special Assistant for Installations, Office of the Secretary of the Air Force.

Sincerely yours,

/s/ Samuel Hanenberg
SAMUEL HANENBERG
Assistant General Counsel

Incl.

Mr. Salvatore A. Locurto
201 East 149th Street
Bronx 55, New York

[fol. 51-P]

December 16th, 1959

Honorable James H. Douglas
Secretary of the Air Force
Washington 25, D.C.

RE: Topsham Air Force Station,
Maine, 177 Unit Capehart
Housing Project

Dear Mr. Douglas:

As counsel for Anthony Grace & Sons, Inc., I have been requested to appeal the decision of Mr. George S. Robinson dated October 1st, 1959.

On October 7th, 1959, I formally appealed the decision in Robinson's letter dated October 1st, 1959 and in my reply requested the return of my client's bid deposit check and also set forth facts in contradiction to Mr. Robinson's allegations. Hearing nothing further, on December 4th, 1959, I called the office of the Department of the Air Force, and spoke with Mr. Samuel Hanenberg concerning a reply to my appeal dated October 7th, 1959. I thereafter, on December 9th, 1959, received a letter from Mr. Hanenberg wherein he furnished me with a copy of a reply sent to my office by Mr. Robinson on October 19th, 1959. This letter was never received by my office.

You are hereby notified of my intention to appeal the decision of Mr. Robinson to withdraw and cancel the Letter of Acceptability dated October 29th, 1958 and his refusal to return the $25,000.00 bid deposit. I am of the opinion that the facts and circumstances as set forth in my letter forwarded to Mr. Robinson on October 7th, 1959, clearly sets forth that the delays caused by the Government Agencies involved made it impossible for the builder to comply with the terms of the Letter of Acceptability.

[fol. 51-Q]

Honorable James H. Douglas December 16, 1958

In view of the aforementioned, the Letter of Acceptability should have been terminated for the convenience of the Government and the $25,000.00 bid deposit returned to Anthony Grace & Sons, Inc.

I request that this Notice of Appeal, as previously set forth in my letter dated October 7th, 1959 be processed in accordance with the Rules of the Armed Services Board of Contract Appeals. Upon receipt of Notice of Docketing I will file a formal Bill of Complaint.

I sincerely request that this appeal be expedited in order that a hearing be held at the earliest possible date.

Very truly yours,

SALVATORE A. LOCURTO

S V
A : A
L T

cc: George S. Robinson
Anthony Grace & Sons, Inc.

[fol. 51-R] PROCUREMENT OFFICE

PR 22 December 1959

Topsham Air Force Station Capehart Housing Project
Anthony Grace & Sons, Inc.
151-45 - Sixth Road
Whitestone, New York

Gentlemen:

Reference is made to letter dated 1 October 1959 addressed to you and letter addressed to Salvatore A. Locurto, Esq., dated 1 October 1959, both signed by Mr. George S. Robinson, Deputy Special Assistant for Installations and both in regard to cancellation of all commitments undertaken with you in connection with the Capehart Housing Project at Topsham Air Force Station, Maine. Mr. Robinson was acting in my behalf and I agree with the action taken by him in this matter.

Yours very truly,

LLOYD H. PURDY
Captain, USAF
Contracting Officer

Copies to:

Salvatore A. Locurto, Esq.
391 E 149th St.
Bronx 55, New York

Hq USAF
AFOCE-HC (2)

Col Nelson
Lt Col Podolak

[fol. 51-S]

DEPARTMENT OF THE AIR FORCE

* * * *

BID FORM
ARMED SERVICES HOUSING PROJECT

* * * *

[fol. 51-T] 3. The bidder understands that, if this bid is determined to be the lowest acceptable bid, the Department will issue to him a Letter of Acceptability in the form attached to the Invitation For Bids, and the bidder [fol. 51-U] agrees that upon issuance of such Letter of Acceptability he becomes obligated to carry out its terms within the times therein stated, at his own expense, within the conditions of his bid security, and without further acceptance, award, advice or other action by the Department.

Such obligations include an obligation to cause performance by the mortgagor-builder corporations, to be formed by the bidder, of each and every act required of it in the Letter of Acceptability, to cause the execution by said mortgagor-builder corporations of a Housing Contract containing the same terms, conditions, provisions and Drawings and Specifications as the specimen form of Housing Contract with good and sufficient surety or sureties as required therein, within the times specified in and in accordance with the Letter of Acceptability.

* * * *

[fols. 52-154] * * *

[fol. 155]

IN THE UNITED STATES COURT OF CLAIMS

No. 133-61

ANTHONY GRACE & SONS, INC.

v.

THE UNITED STATES

OPINION OF COMMISSIONER AND RECOMMENDATION FOR CONCLUSION OF LAW—Filed September 22, 1964

To the honorable the CHIEF JUDGE AND ASSOCIATE JUDGES OF THE UNITED STATES COURT OF CLAIMS:

The following opinion and recommendation for conclusion of law are submitted pursuant to the order of the court under Rule 54(b):

In this action plaintiff seeks to recover its bid deposit and damages it allegedly incurred as a result of cancellation by defendant of commitments made by the Department of the Air Force to plaintiff for the construction of a military housing project under the Capehart Act.[1] [fol. 156] The case is before the court on defendant's motion for summary judgment on the grounds that plaintiff has failed to exhaust its administrative remedies and has failed to state a claim for which relief may be granted.

On August 22, 1958, the Department of the Air Force issued an invitation for bids for the construction of 177

[1] 42 U.S.C. §§ 1594-1594j(f); 12 U.S.C. §§ 1748-1748i. For a brief explanation of the procedures under the Capehart Act, see *Anthony P. Miller, Inc.* v. *United States*, Ct.Cl. No. 3-62, decided April 5, 1963.

military Capehart housing units at Topsham Air Force Station in Maine. The invitation, after setting forth the purposes of the Capehart Act, provided in pertinent part:

* * * *

4. The bidder should carefully examine the provisions of the form of Housing Contract attached hereto, including the Drawings and Specifications made a part thereof; visit the site of the housing projects; and fully inform himself as to all conditions and matters which can in any manner affect the financing of the construction and the constructing of the housing projects or their cost. Should the bidder find discrepancies in, or omissions from, such Drawings and Specifications or other documents attached hereto, or should he be in doubt as to their meaning, he should at once notify the Contracting Officer, Otis Air Force Base, Massachusetts, and obtain clarification prior to submitting a bid. Information given will be transmitted to all known interested bidders.

5. Under the provisions of Title IV of the Housing Amendments of 1955, as amended, the total principle amount of the mortgages is limited, among other things to the amount of the bid of the eligible builder. However, the Davis Bacon Act and Section 212(a) of the National Housing Act as amended require that [fol. 157] wages paid to laborers and mechanics be the prevailing wage as determined by the Secretary of Labor not more than ninety (90) days prior to the commencement of construction. Since more than ninety (90) days may elapse from the date of this Invitation For Bids to the commencement of construction, the bids called for by this Invitation For Bids will include a provision for adjustment of the dollar amount therein specified to reflect any difference between the tentative minimum wage schedule attached hereto and the applicable minimum wage schedule as finally determined by the Secretary of Labor. Any such adjustment will be in an amount determined by the Commissioner to reflect such differences, and the amount of the lowest acceptable

bid and the FHA estimated total replacement cost of the projects will be amended in the amount so determined by the Commissioner; except that, if such an adjustment would increase the amount of the bid above the amount of any other statutory maximum applicable to the insurable mortgages, the eligible builder will have the option of reducing his bid to such statutory maximum or of withdrawing his bid.

* * * *

8. Each bidder is required to submit with his bid a certified check in the amount of $25,000, payable to the Treasurer of the United States, to insure that if he is the lowest acceptable bidder for the total of 177 family housing units he will perform the necessary preliminary steps and effect a closing with FHA within the time prescribed in the Letter of Acceptability, including the furnishing of an acceptable performance and payment bond. In the event the lowest acceptable bidder fails to effect a closing with FHA within the time prescribed, his deposit will be forfeited and become the property of the Government as damages unless the Department finds that he has made every effort to effect such closing and extends the time to effect such closing. If the lowest acceptable bidder effects a timely closing with the FHA the amount of his deposit will be refunded to him 24 hours after the initial closing with FHA. The deposits of unsuccessful bidders will be returned to them not later than 60 days after the opening of the bids. . . .

[fol. 158] a. "Timely Closing" as referred to in this paragraph of the Invitation For Bids and closing period as referred to elsewhere in these forms is construed to be a period of approximately 60 days from the date of opening of bids.

* * * *

12. Bidders are advised that the maximum total of the insurable mortgages may not exceed the lesser of three items being (1) amount of the lowest acceptable bid. (2) FHA Total of the estimated re-

placement cost of the property or projects or (3) an average per family unit of $16,500 less the estimated value of any usable utilities within the property or projects where owned by the Department or furnished by other than mortgage proceeds. Attention is invited to FHA's Final Appraisal and Eligibility Statements attached hereto. The bidder will be required to pay the fees and costs prescribed in such statements.

* * * *

22. The eligible builder, and all his subcontractors, will be required to pay all mechanics and laborers employed for working directly upon the sites of the housing projects not less than the prevailing wages as determined by the Secretary of Labor. A tentative wage scale is attached hereto. Such tentative wage scale is, however, subject to revision prior to actual start of construction in accordance with Secretary of Labor reqirements. For the effect of such revision see paragraph 5 above.

* * * *

Bid Form:

3. The bidder understands that, if this bid is determined to be the lowest acceptable bid, the Department will issue to him a Letter of Acceptability in the form attached to the Invitation For Bids, and the bidder agrees that upon issuance of such Letter of Acceptability he becomes obligated to carry out its terms within the times therein stated, at his own expense, within the conditions of his bid security, and [fol. 159] without further acceptance, award, advice or other action by the Department. Such obligations include an obligation to cause performance by the mortgagor-builder corporations, to be formed by the bidder, of each and every act required of it in the Letter of Acceptability, to cause the execution by said mortgagor-builder corporations of a Housing Contract containing the same terms, conditions, provisions and Drawings and Specifications as the specimen form of Housing Contract with good and suffi-

cient surety or sureties as required therein, within the times specified in and in accordance with the Letter of Acceptability.

* * * *

4. The Bidder represents that he is aware of the statutory requirements of Section 212(a) of the National Housing Act, as amended, and of the Davis Bacon Act that wages to be paid to laborers and mechanics employed in the construction of the projects are required to be not less than those contained in the prevailing wage determination of the Secretary of Labor, and that, in order to comply with these statutory provisions, the bid price is subject to increase or decrease by an amount determined by the Federal Housing Commissioner (hereinafter called the "Commissioner") to represent the difference in the "Total Estimate of Replacement Cost of the Total Project," computed according to the wage schedule attached to the Invitation For Bids, and computed according to the wage schedule as amended by the "prevailing wage determination" as that term is defined in Paragraph 19 of the specimen form of the Housing Contract attached to the Invitation For Bids. Moreover, the Bidder realizes that, if the amount of his bid as specified in the Letter of Acceptability, is thereby increased so as to exceed the maximum total amount of the insurable mortgages as determined by the Commissioner, the Bidder shall have the option of reducing his bid to the amount of the maximum total insurable mortgages as determined by the Commissioner, or of withdrawing his bid.

* * * *

[fol. 160] 8. The bidder agrees that, if issued a Letter of Acceptability, and if he does not exercise the option of withdrawing his bid pursuant to Paragraph 4 above, he will commence the work called for by the Drawings and Specifications within 15 calendar days after the date of closing, and that he will complete the work called for by the Housing Contract as

expeditiously as possible, but in no event later than 450 calendar days after date of closing.

* * * *

Attached to the invitation for bids was a tentative minimum wage schedule which contained the following introductory language:

> The latest wage determination made by the Secretary of Labor for the country in which the work is being performed is included herein. The complete determination is incorporated in the contract specifications regardless of whether the Contractor will employ all the classes of laborers and mechanics listed.

The schedule set forth the minimum rates of wages per hour for certain classes of laborers and mechanics, apprentices, building construction personnel, and heavy and highway construction personnel. The rates in the schedule for the heavy and highway construction personnel were lower than the rates for the building construction personnel. The schedule bore an expiration date of September 18, 1958.

There were also attached to the invitation for bids, specifications which defined the scope and situs of the work to be performed.

[fol. 161] These specifications included a breakdown into "Section 1 on-site, site preparation" and "Section 2 on-site, Excavation, Filling and Back-filling for Building Construction." Section 1 of paragraph 1-18 of the specifications provided in part:

On Site
Site Preparation

1-18 EXCAVATION, TRENCHING, AND BACK-FILLING FOR UTILITIES SYSTEM:

(a) The work consists of furnishing all plant, labor, equipment, appliances, and materials, and in performing all operations in connection with excavation, trenching, and backfiling for utilities system, complete, in strict accordance with this section of the specifications and the applicable drawings.

(b) All excavation for utilities systems occurring within the enclosing walls or appurtenances of buildings or other structures and out to a line 5 feet outside of the walls or appurtenances thereof, is covered under EXCAVATION and GRADING FOR BUILDING CONSTRUCTION, and is not included under this section of the specifications.

* * * *

Section 2 of paragraph 2-01 of the specifications provided:

2-01 Scope

(a) Work Included. The work covered by this section of the Specifications consists in furnishing all plant, labor, equipment and materials and in performing all operations in connection with excavating, filling, backfilling and rough grading, complete for the building and for building utilities lines to a point five (5) feet outside the foundation line, and other related items in strict accordance with this Section of the Specifications and the applicable Drawings, [fol. 162] and subject to the terms and conditions of the contract.

(b) Work not Included. Clearing and grubbing, excavation, filling and grading for parking areas, roads, walks, drainage, sewers and other sub-surface utilities systems, and excavation for the building utilities beyond planes five (5) feet outside the building line are not included under this Section of the Specifications. Stripping of topsoil is specified in Section 1, Site Preparation.

On or about September 30, 1958, plaintiff submitted its bid to construct the housing project at a base price of $2,653,022, with an additional price of $213,071, for certain additive alternatives, or at a total price of $2,866,093. Plaintiff submitted with its bid a deposit, as required by paragraph 8 of the invitation for bids, in the amount of $25,000.

On October 29, 1958, Mr. George S. Robinson, deputy special assistant for installations, Department of the Air Force sent to plaintiff a "Letter of Acceptability" in

which plaintiff was advised that its bid of $2,866,093, for the housing project, including the additives, was the lowest acceptable bid; and, in which, plaintiff was further advised of its obligations to complete a number of arrangements before the "closing" which was scheduled on or before January 8, 1959. The letter of acceptability specified that among the arrangements which plaintiff was to make prior to the closing was the following: [fol. 163]

* * * *

n. Make application through the Contracting Officer, Otis Air Force Base, Massachusetts, to the Secretary of Labor for an appropriate wage determination, if necessary, (on a Department of Labor Form DB-11 which will be supplied upon request by the Contracting Officer) for use in the construction of the project, and furnish a copy of such wage determination to the Contracting Officer and the Commissioner. Such wage determination will be used by the Commissioner to increase or decrease the bid price in the manner specified in your bid.

The letter of acceptability also provided in part:

2. Failure to perform all obligations prior to the time prescribed for closing will be just cause for cancelling all commitments undertaken with you in connection with the housing project and for the recovery under your bid security of liquidated damages in the sum of $25,000, together with actual damages to the Department, such actual damages to be itemized and determined by the Contracting Officer, whose decision will be reduced to writing and furnished to you by mail or otherwise. Such decision shall be final and conclusive unless, within 30 days from the receipt thereof, you appeal in writing to the head of the Department or his duly authorized representative, and his decision shall, unless determined by a court of competent jurisdiction to have been fraudulent or capricious or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence, be final and conclusive. In con-

nection with any appeal under this paragraph you will be afforded an opportunity to be heard and to offer evidence in support of your appeal.

* * * *

6. You are required to be ready for the closing on or before January 8, 1959, and your failure to do so will indicate your inability to carry out the obligations and terms of your bid and this Letter of Acceptability, provided that the Contracting Officer may extend the date of closing in writing upon your
[fol. 165] submission of written documented proof that the delay was caused by conditions beyond your control.

On November 19, 1958, pursuant to the obligations specified in the letter of acceptability, plaintiff made a request of the Secretary of Labor for an appropriate wage determination. On January 28, 1959, there were issued by the Secretary of Labor two separate wage rate decisions, with expiration dates of April 29, 1959. One of the decisions contained a description of work as "General Construction of 177 family housing units" and set forth rates for laborers and mechanics, apprentices and building construction personnel. The other decision contained a description of work as "Construction of Streets and Roads in connection with Capehart Housing" and set forth rates for heavy and highway construction personnel. As in the instance of the tentative minimum wage schedule which was attached to the invitation for bids, the rates set forth in the wage rate decisions for the heavy and highway construction personnel were lower than the rates for the building construction personnel.

After receiving the wage rate decisions of the Secretary of Labor, plaintiff concluded that the effect of the decisions was to require it to pay the higher building construction rates for a greater area of the work than pro-
[fol. 166] vided by the specifications, and that plaintiff's bid price should be increased, in accordance with the letter of acceptability, to reflect the higher rates. In essence, plaintiff's position was that under the specifications it was required to pay the higher building con-

struction rates for work to a point 5 feet outside the building foundation line, and that for work beyond this point it was required to pay only the lower heavy and highway construction rates; but, that under the descriptions of work contained in the decisions it was required to pay the higher building construction rates for all work beyond the above-indicated point, except for work covering construction of streets and roads. Because of difference between the parties arising out of the foregoing decisions, the original closing date of January 8, 1959, set forth in the letter of acceptability, was extended on several occasions while conferences were held by the parties on the matter.

By letter of March 18, 1959, the director of the Federal Housing Administration advised plaintiff that there would be an increase in the wage rates allowed plaintiff in some categories where the promulgated rates had been increased, but that there had been no change in the rates for either heavy and highway personnel or for building construction [fol. 167] power operators and that he had not been able to justify an increase based upon plaintiff's interpretation.

On May 29, 1959, following exchanges of correspondence and meetings of the parties, plaintiff requested a determination of the Department of the Air Force relative to plaintiff's interpretation of the pertinent documents from which plaintiff concluded that it was entitled to an additional increase of $85,834 in bid price. By letter of June 26, 1959, plaintiff was advised by George S. Robinson, deputy special assistant for installations, Department of the Air Force that he did not concur in plaintiff's position. The letter continued:

> If you intend to effect a closing, you should advise me promptly in order that the Letter of Acceptability may be amended. If you decide not to effect a closing, or advice as to your intention is not withdrawn in 10 days, the letter of acceptability will be withdrawn.

On July 2, 1959, plaintiff wrote to Mr. Robinson that it did not approve of his decision; that, as a result of the delay in the matter, plaintiff had sustained considerable

monetary losses; and, that plaintiff was not in a position to set a definite closing date until the matters were resolved.

By letter dated October 1, 1959, Mr. Robinson advised plaintiff that its letter of July 2, 1959, "indicating an [fol. 168] unwillingness to set a closing date constitutes a failure on your part to perform your obligations under your bid and under the letter of acceptability." The letter continued:

* * * *

> 3. Accordingly, pursuant to paragraph 2 of the letter of acceptability, the Department hereby cancels all commitments undertaken with you in connection with the housing project, reserving all its rights with respect to the recovery of damages.

By letter dated October 7, 1959, addressed to Mr. Robinson, plaintiff, through its counsel, denied that it had indicated an unwillingness to set a closing date, charged the Air Force with the responsibility for the then existing problems, requested return of the bid deposit, and stated that plaintiff "is reserving all of its rights with respect to recovery of damages due to the failure of the Department of the Air Force to comply with all of the bid instructions and regulations thereby creating the situation that exists."

By letter dated October 19, 1959, Mr. Robinson replied to plaintiff's counsel that the cancellation of the commitments was compelled by plaintiff's "repeated refusals to perform its obligations under its bid and the Letter of Acceptability, with the result that it was necessary to revise the plans and rebid the project," and that the request for the return of the bid deposit was denied. For [fol. 169] some unexplained reason, the letter of October 19, 1959, did not reach plaintiff's counsel, who, prompted by concern that he had received no reply to his letter of October 7, 1959, made inquiry by telephone of defendant on December 4, 1959, and was then furnished a copy of the letter of October 19, 1959, which he received on December 9, 1959.

By letter dated December 16, 1959, plaintiff's counsel wrote to the Secretary of the Air Force as follows:

As counsel for Anthony Grace & Sons, Inc., I have been requested to appeal the decision of Mr. George S. Robinson dated October 1st, 1959.

On October 7th, 1959, I formally appealed the decision in Robinson's letter dated October 1st, 1959 and in my reply requested the return of my client's bid deposit check and also set forth facts in contradiction to Mr. Robinson's allegations. Hearing nothing further, on December 4th, 1959, I called the office of the Department of the Air Force, and spoke with Mr. Samuel Hanenberg concerning a reply to my appeal dated October 7th, 1959. I thereafter, on December 9th, 1959, received a letter from Mr. Hanenberg wherein he furnished me with a copy of a reply sent to my office by Mr. Robinson on October 19th, 1959. This letter was never received by my office.

You are hereby notified of my intention to appeal the decision of Mr. Robinson to withdraw and cancel the Letter of Acceptability dated October 29th, 1958 and his refusal to return the $25,000.00 bid deposit. I am of the opinion that the facts and circumstances as set forth in my letter forwarded to Mr. Robinson on October 7th, 1959, clearly sets forth that the delays caused by the Government Agencies involved [fol. 170] made it impossible for the builder to comply with the terms of the Letter of Acceptability.

In view of the aforementioned, the Letter of Acceptability should have been terminated for the convenience of the Government and the $25,000.00 bid deposit returned to Anthony Grace & Sons, Inc.

I request that this Notice of Appeal, as previously set forth in my letter dated October 7th, 1959 be processed in accordance with the Rules of the Armed Services Board of Contract Appeals. Upon receipt of Notice of Docketing I will file a formal Bill of Complaint.

I sincerely request that this appeal be expedited in order that a hearing be held at the earliest possible date.

By letter dated December 22, 1959, the procurement contracting officer advised plaintiff that Mr. Robinson had been acting in his behalf in regard to cancellation of the commitments and that he agreed with the action taken by Mr. Robinson.

The letter of December 16, 1959, to the Secretary of the Air Force from plaintiff's counsel was docketed by the Armed Services Board of Contract Appeals on December 31, 1959. Thereafter, the Government moved to dismiss the appeal on the grounds that Mr. Robinson's letter of October 1, 1959, canceling the commitments undertaken with plaintiff, was "an appealable decision"; and, that no written appeal was taken from that letter or from Mr. Robinson's letter of October 19, 1959 within 30 days, as [fol. 171] provided by paragraph 2 of the letter of acceptability.

Plaintiff contended before the Board that the letter of October 1, 1959, from Mr. Robinson was not a final decision within the "disputes clause" (paragraph 2) of the letter of acceptability, but that, nevertheless, the letter of October 7, 1959, from plaintiff's counsel did constitute an appeal; that the only correspondence from the Government which constituted an appealable decision within the disputes clause was the letter from Mr. Robinson of October 19, 1959, and that since that letter was not received until December 8, 1959, the letter of December 16, 1959, from plaintiff's counsel containing the appeal notice was timely. Plaintiff also contended that Mr. Robinson, the deputy special assistant for installations, who signed pertinent letters on defendant's behalf was not the contracting officer for the purposes of the disputes clause, and that plaintiff had already filed its appeal by the time the contracting officer had, by his letter of December 22, 1959, made his decision.

The Board concluded that the letter of October 1, 1959, from Mr. Robinson constituted an appealable decision and was at the time so regarded by plaintiff; and that the letter of October 7, 1959, from plaintiff's counsel did not [fol. 172] contain "a then present intent * * * to invoke the right of appeal," and, hence, did not constitute an appeal within the disputes clause. Since the December 16,

1959, letter from plaintiff's counsel containing the appeal notice was after the period of 30 days from the October 1, 1959, letter, the Board found that the appeal was not timely. Regarding the status of Mr. Robinson, the Board stated in effect that he had been "the Government's representative in all dealing of legal consequence between the parties," had signed the invitation for bids, the letter of acceptability, and various other pertinent letters, including the letter from which plaintiff contended it had appealed, and that the contracting officer "was at all times a virtual stranger" to plaintiff.

Accordingly, the Board, on June 29, 1960, granted the Government's motion and dismissed the appeal.

In considering the issue of timeliness of plaintiff's appeal to the Armed Services Board of Contract Appeals, it is apparent that the question presented, namely, interpretation of the provisions of the contract documents which set forth the specifics of an appeal and the corresponding interpretation of the effect of letters which allegedly constituted "decisions" and/or "appeals," is a question of law; hence, it and related factual issues are to be [fol. 173] resolved independently by the court even though the sole record before the court is the administrative record. *P.L.S. Coat & Suit Corp.* v. *United States*, 148 Ct.Cl. 296 (1960); *Beacon Construction Co.* v. *United States*, Ct.Cl. No. 44-58, decided March 6, 1963, 314 F. 2d 501; *WPC Enterprises, Incorporated* v. *United States*, Ct.Cl. No. 256-59, decided October 11, 1963, 323 F. 2d 874; *Stein Bros. Mfg. Co.* v. *United States*, Ct.Cl. No. 389-59, decided July 12, 1963; *Wingate Construction Co.* v. *United States*, Ct. Cl. No. 394-60, decided January 24, 1964.

The parties are agreed that the governing provisions of the contract documents regarding an appeal appear in paragraph 2, the "disputes clause," of the letter of acceptability which, though heretofore set forth, bears repeating for closer examination, as follows:

> 2. Failure to perform all obligations prior to the time prescribed for closing will be just cause for cancelling all commitments undertaken with you in connection with the housing project and for the recovery under your bid security of liquidated damages

in the sum of $25,000, together with actual damages to the Department, such actual damages to be itemized and determined by the Contracting Officer, whose decision will be reduced to writing and furnished to you by mail or otherwise. Such decision shall be final and conclusive unless, within 30 days from the receipt thereof, you appeal in writing to the head of the Department or his duly authorized representative, and his decision shall, unless determined by a court of competent jurisdiction to have been fraudu-
[fol. 174] lent or capricious or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence, be final and conclusive. In connection with any appeal under this paragraph you will be afforded an opportunity to be heard and to offer evidence in support of your appeal.

In light of the foregoing disputes clause, let us turn to the pertinent language of the letter of October 1, 1959, to plaintiff from Mr. Robinson to determine if there was therein a "decision" which would become "final and conclusive" unless appealed from within 30 days. This pertinent language reads:

* * * *

3. Accordingly, pursuant to paragraph 2 of the letter of acceptability, the Department hereby cancels all commitments undertaken with you in connection with the housing project, reserving all its rights with respect to the recovery of damages.

A fair reading of the provisions of the disputes clause compels the conclusion that the decision of the contracting officer should include not only language canceling the commitments, but also language setting forth a conclusion regarding recovery of the bid security and itemization of such actual damages which the contracting officer determined should be recovered.

It is clear from the pertinent language of the October 1, 1959, letter that all of the elements of a decision required [fol. 175] by the disputes clause are not present, because the only reference to damages (whether liquidated or actual) is that defendant was "reserving all its rights

with respect to the recovery of damages." Upon reading this letter, plaintiff could not tell whether defendant had decided to recover liquidated damages, whether defendant was claiming actual damages or in what amount, or even when defendant expected to reach a conclusion as to liquidated or actual damages. Conceivably, plaintiff could have concluded that if there was to be no recovery sought by defendant of liquidated damages or of actual damages, it would be satisfied for the commitments to be canceled and would not appeal; but, plaintiff could not make an intelligent determination on the matter from the contents of the letter. It is concluded that the letter did not constitute a "decision" within the disputes clause, even though, as defendant points out, plaintiff in subsequent correspondence did refer to the "decision" in the October 1, 1959, letter. Having reached this conclusion, it is unnecessary to consider whether or not the letter of October 7, 1959, from plaintiff's counsel requesting return of the bid deposit and advising that plaintiff was "reserving all of its rights with respect to recovery of damages" con- [fol. 176] stitutes an appeal, because the letter from plaintiff's counsel of December 16, 1959, which admittedly constituted an appeal was within the 30-day period after the receipt by plaintiff's counsel on December 8, 1959, of defendant's letter of October 19, 1959. It is likewise unnecessary to consider the question raised by plaintiff as to the status of Mr. Robinson, the deputy special assistant for installations.

It is accordingly concluded that plaintiff did make timely appeal and, therefore, did exhaust its administrative remedies, and is entitled to seek relief in this court.

Defendant contends that, irrespective of the issue of exhaustion of administrative remedies, plaintiff may not maintain its action in the court, because under the terms of the letter of acceptability plaintiff could not refuse to "close" a Capehart contract over a disagreement on the administrative determinations of appropriate minimum wages for the housing project, and that such determinations are not subject to judicial review.

Plaintiff has pleaded in its petition that defendant "unilaterally altered the scope of work provisions" and issued "wage schedules in direct contravention of its con-

[fol. 177] tractual obligations," and that defendant's action made it impossible for plaintiff to continue in its efforts to perform under the contract. Plaintiff further contends that its interpretation of the plans and specifications is correct "in light of the interpretation given such plans and specifications by custom and usage in the trade."

Obviously the parties are in disagreement over the nature of the issue presented and, of course, the Armed Services Board of Contract Appeals, having reached its decision solely on the matter of the timeliness of plaintiff's appeal, did not consider any other issue.

If the issue could be stated in the terms which are suggested by defendant, then it could be resolved solely on the basis of the contract documents before the court. Plaintiff alleges in effect, however, that defendant did something more than merely make an administrative determination of appropriate minimum wages, but that defendant unilaterally altered the scope of work provisions and that defendant's action made it impossible for plaintiff to perform; i.e., that defendant, rather than plaintiff, was at fault. Since the issue then, at least as presented by plaintiff, involves an alleged breach of contract, this court is not in the consideration of the issue, subject to [fol. 178] the strictures of *United States* v. *Carlo Bianchi & Co., Inc.*, 373 U.S. 709 (June 3, 1963), pertaining to a question arising under a "disputes" clause. There appear, moreover, to be factual issues bearing on the alleged breach which should be resolved, but, regarding which, the record in its present state before the court is barren. For example, the question of the custom and usage in the trade from which plaintiff derives its conclusion that its interpretation of the plans and specifications is correct might properly be explored. Again, it is probable that the conduct and/or statements of the parties, in their numerous conferences over the matters in dispute, might have significant bearing on whether plaintiff or defendant was at fault. This is not to suggest that the foregoing should necessarily be the subject of testimony at a trial, but only that, because of its peculiar history, the case does not in its present posture contain a record touching on the vari-

ous factual issues which plaintiff, in its reply to defendant's motion for summary judgment, requests opportunity to try.

[fol. 179]

RECOMMENDATION FOR CONCLUSION OF LAW

It is recommended that the court adopt the following concusion of law:

On the administrative record and briefs of the parties and for the reasons stated above, the court concludes as a matter of law that defendant's motion for summary judgment is denied.

Respectfully submitted,

RICHARD ARENS, *Commissioner.*

[fols. 180-195] • • •

[fol. 196]

IN THE UNITED STATES COURT OF CLAIMS

No. 133-61

ANTHONY GRACE & SONS, INC.

v.

THE UNITED STATES

David Fromson for the plaintiff.

David Orlikoff, with whom was *Assistant Attorney General John W. Douglas*, for the defendant. *Mary J. Turner* was on the brief.

Before COWEN, *Chief Judge*, LARAMORE, DURFEE, DAVIS and COLLINS, *Judges*.

OPINION—Decided May 14, 1965

ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

COWEN, *Chief Judge*, delivered the opinion of the court:

In this action plaintiff seeks to recover its bid deposit and damages it allegedly incurred as a result of cancellation by defendant of commitments made by the Department of the Air Force to plaintiff for the construction of a military housing project under the Capehart Act.[1] The case is before the court on defendant's motion for summary judgment on the grounds that plaintiff has failed

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[1] 42 U.S.C. §§ 1594-1594j; 12 U.S.C. §§ 1748-1748i. For a brief explanation of the procedures under the Capehart Act, see *Anthony P. Miller, Inc.* v. *United States*, No. 3-62, Ct. Cl., April 5, 1963.

to exhaust its administrative remedies and has failed to state a claim for which relief may be granted.

This motion was referred to Trial Commissioner Richard Arens, under Rule 54(b), for his opinion and recommendations for a conclusion of law. Commissioner Arens has submitted an opinion and recommendations. The de- [fol. 197] fendant sought review of both, and the case was set for argument. The plaintiff submitted on the briefs but the defendant presented oral argument.

I

The first issue is whether the plaintiff failed to exhaust its administrative remedies because its appeal to the Board of Contract Appeals from the cancellation (and the refusal to return its deposit) was untimely (as the Board held). Commissioner Arens' opinion concludes that the appeal was not untimely and the Board erred in dismissing it on that ground. The court agrees (with slight modifications) with that portion of the Commissioner's opinion (set forth in Part III, *infra*) and adopts it, as so modified, as the basis for rejecting the defendant's argument that plaintiff is barred from suing in this court because it failed properly to exhaust its administrative remedy.

The second issue is whether, in any event, plaintiff states a cause of action. Defendant contends that, irrespective of the issue of exhaustion of administrative remedies, plaintiff may not maintain its action because under the terms of the letter of acceptability plaintiff could not refuse to "close" a Capehart contract over a disagreement on the administrative determinations of appropriate minimum wages for the housing project, and that such determinations are not subject to judicial review.

Plaintiff has pleaded in its petition that defendant "unilaterally altered the scope of work provisions" and issued "wage schedules in direct contravention of its contractual obligations," and that defendant's action made it impossible for plaintiff to continue in its efforts to perform under the contract. Plaintiff further contends that its interpretation of the plans and specifications is correct

"in light of the interpretation given such plans and specifications by custom and usage in the trade."

Thus, the parties are in disagreement over the nature of the issue presented and, of course, the Armed Services Board of Contract Appeals, having reached its decision solely on the matter of the timeliness of plaintiff's appeal, did not consider any other issue.

[fol. 198] The Trial Commissioner recommended that the decision on defendant's contention that plaintiff fails to state a cause of action should be resolved only after trial. In the Trial Commissioner's view, the issues are not now precisely framed; evidence as to the conduct of the parties may shed some light on the issues, and there are unresolved issues of fact.

Even where a motion for summary judgment meets the technical requirements for the granting of the motion, the court may in its discretion deny the motion. See Ct. Cl. R. 64; Fed. R. Civ. P. 56; *Williams* v. *Howard Johnson's Inc. of Washington*, 323 F. 2d 102 (4th Cir. 1963); *S. J. Groves & Sons Co.* v. *Ohio Turnpike Commission*, 315 F. 2d 235 (6th Cir. 1963). Denial of the motion is appropriate when the legal issues are of particular significance, or particularly complex, or where the legal issues can be intelligently resolved only upon a fully developed record. See *Kennedy* v. *Silas Mason Co.*, 334 U.S. 249 (1948); *Pacific American Fisheries, Inc.* v. *Mullaney*, 191 F. 2d 137 (9th Cir. 1951). We believe this to be a proper case for the exercise of that discretion.[2]

II

Having determined that the Armed Services Board of Contract Appeals improperly refused to consider plain-

[2] See 6 Moore F. P. §§ 56.15[6], 56.16 (2d Ed. 1953), the former section comments at pp. 2158-2159:

> "* * * the court must necessarily evaluate the character of the record in light of the legal issues; and it should take care not to adjudicate difficult or complicated legal issues, either of a private or public nature, upon an inadequate factual basis. A sound appraisal may demand that the motion be denied and that the case proceed to trial. * * *" See also *United States* v. *Small*, 24 F.R.D. 429 (S.D.N.Y. 1959).

tiff's appeal on its merits (Part III hereof), we must consider whether we should suspend action in this court and direct the plaintiff to return the case to the Board, or whether we should deny defendant's motion and remand the litigation to our Trial Commissioner.

It is an accepted principle that where the administrative remedy is inadequate, a party will no longer be required to exhaust that remedy as a prerequisite to maintaining an action in court. Davis, *Administrative Law*, [fol. 199] § 189 (1951)[3] This court has entertained an action without requiring further recourse to the contractual administrative procedures where the contracting officer has refused to render a decision as required by the contract or has delayed his decision excessively. *Maxan Dress Corp.* v. *United States*, 126 Ct. Cl. 434, 115 F. Supp. 439 (1953); *United States Casualty Co.* v. *United States*, 107 Ct. Cl. 46, 67 F. Supp. 950 (1946). The same rule has been applied where the head of the agency similarly erred. *Southeastern Oil Florida, Inc.* v. *United States*, 127 Ct. Cl. 480, 115 F. Supp. 198 (1953); *Heid Bros., Inc.* v. *United States*, 69 Ct. Cl. 704 (1930); *Cape Ann Granite Co., Inc.* v. *United States*, 100 Ct. Cl. 53, *cert. denied*, 321 U.S. 790; *Cf. Hele* v. *United States*, 100 Ct. Cl. 289 (1943) and 103 Ct. Cl. 472 (1945).

In *Southeastern Oil Florida, supra*, the plaintiff had contracted to transport government gasoline. The contracting officer determined that the plaintiff was responsible for the contamination of some of the gasoline and withheld moneys due under the contract. The contractor pursued his remedies under the contract and appealed to the Secretary of the Navy. For 2 years the appeal was not acted upon, and the contractor filed suit. This court commented, 127 Ct. Cl. 480, 484:

> Defendant argues that because plaintiff's appeal to the head of the department is still pending, this court has no jurisdiction of plaintiff's claim. It is

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[3] See generally, *Brister & Koester Lumber Corp.* v. *United States*, 188 F. 2d 986 (D.C. Cir. 1951); *United States* v. *Blake*, 161 F. Supp. 76 (E.D.N.C. 1958); *Wessel, Duval & Co.* v. *United States*, 126 F. Supp. 79 (S.D.N.Y. 1954).

true that a contractor must exhaust the administrative remedies provided in the contract before it is entitled to bring suit in this court. *United States* v. *Blair*, 321 U.S. 730, 735; *United States* v. *Holpuch Co.*, 328 U.S. 234, 240. These cases also set forth the exception to this rule, however, which is that a contractor is not prevented from suing in this court where the administrative appeal procedure provided in its contract is, in fact, inadequate or unavailable. In the Blair case, the Supreme Court recognized that (p. 736):

> If it were shown that the appeal procedure provided in the contract was in fact inadequate * * * we would have a quite different case.

Likewise, in the *Holpuch* decision, the Supreme Court stated that (p. 240):

> And in the absence of some clear evidence that the appeal procedure is inadequate or unavail-
> [fol. 200] able, that procedure must be pursued and exhausted before a contractor can be heard to complain in a court.

In this case, the plaintiff having appealed to the head of the department, and the head of the department having failed for more than two years to indicate whether he would or would not take jurisdiction of the appeal, the plaintiff was justified in regarding the administrative appeal procedure as inadequate and in filing its suit in this court. Having filed its suit, it was not required to abandon that suit and resume the administrative procedure.

We must now query whether the decision in *United States* v. *Carlo Bianchi & Co., Inc.*, 373 U.S. 709 (1963) alters the rule announced in the cases cited above. Since the *Bianchi* case was handed down, this court has decided that the failure of the contracting officer to perform his adjudicatory functions permits an action to be maintained in this court without any further administrative proceedings, *C. J. Langenfelder & Sons, Inc.* v. *United States*, No. 291-63, Ct. Cl., February 19, 1965, 334 F. 2d 600;

H. B. Zachry Co. v. *United States*, No. 332-61, Ct. Cl., April 16, 1965.[4] We believe that if a contracting officer's failure to act allows immediate recourse to the courts, it follows a fortiori that a similar lack of action by a contract appeals board should also permit such immediate resort to the courts.

The decisions in *Langenfelder* and *Zachry*, *supra*, dictate that in the case before us, we retain the case for trial in this court.

[fol. 201] We believe that this result is in accord with the Supreme Court's decision in the *Bianchi* case, *supra*. Justice Harlan, speaking for the majority in that case, made the following observations on the sanctions to be imposed by this court when confronted with an unacceptable administrative record. (373 U.S. 709, 717-718):

> * * * *Second*, in situations where the court believed that the existing record did not warrant such a course, but that the departmental determination could not be sustained under the standards laid down by Congress, we see no reason why the court could not stay its own proceedings pending some further action before the agency involved. Cf. *Pennsylvania R. Co.* v. *United States*, 363 U.S. 202. Such a stay would certainly be justified where the department had failed to make adequate provision for a record

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[4] In cases where the court's decision was contrary to that of the administrative boards and the board had made no findings on the quantum of an equitable adjustment determined to be due, this court retained the case and permitted a trial on that issue, *E. H. Sales, Inc.* v. *United States*, No. 75-61, Ct. Cl., January 22, 1965. *Jack Stone Co.* v. *United States*, No. 312-62, April 16, 1965.

But see, *Utah Construction and Mining Co.* v. *United States*, No. 3-61, Ct. Cl., December 11, 1964, where the court resolved, on a hypothetical basis, the disposition of the concrete aggregate claim which had been rejected by the administrative board as untimely. The issue of whether to suspend proceedings was not, at that time, squarely before the court; the issue was only marginally raised by defendant and was not briefed. Since that time, in this and several other cases, we have had the benefit of argument, briefs, and more detailed reflection on the question. Therfore, the conclusion in the *Utah* case does not, in view of the circumstances under which it was made, foreclose our reconsideration of the issue.

> that could be subjected to judicial scrutiny, for it was clearly part of the legislative purpose to achieve uniformity in this respect. And in any case in which the department failed to remedy the particular substantive or procedural defect or inadequacy, the sanction of judgment for the contractor would always be available to the court.

The foregoing comment must be read in the light of the Supreme Court's policy to expedite the disposition of such litigation—a policy stated in the same opinion at page 717 as follows:

> * * * The consequences of such a procedure [duplication of trials] would in many instances be a needless duplication of evidentiary hearings and a heavy additional burden in time and expense required to bring litigation to an end.

A suspension of proceedings in this court for additional action by an administrative board should be ordered only where the suspension will actually expedite handling of the litigation or where the Supreme Court has indicated that a stay of court proceedings is justified. It should be emphasized that we have no remand power in these cases. Therefore, where an appeals board has refused jurisdiction in a case, or where its prior decisions demonstrate that it will not entertain jurisdiction of a particular dis- [fol. 202] pute, a return of the proceedings to the board is a useless gesture which will be productive only of further delay in the litigation.[5]

It is to be noted that in *Bianchi*, the Supreme Court did not have before it, nor did it discuss, a situation where a contract appeals board has refused jurisdiction. But the Court in that case squarely addressed itself to the problems of delay. Accordingly, we conclude that the re-

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[5] The Armed Services Board of Contract Appeals has consistently held that it did not have jurisdiction to review the decisions of the Federal Housing Commissioner on contracts such as that in issue here, *Len Co. and Associates*, 1962 BCA 17854 (ASBCA 1962); *Anthony Grace & Sons, Inc.*, 1962 BCA 17882 (ASBCA 1962); see also *Centex Constr. Co.* v. *United States*, No. 342-60, Ct. Cl., June 7, 1963.

tention of this case for trial in this court best accords with the enunciated policy of speeding contract litigation.[6]

III

Commissioner Arens' opinion on the timeliness of plaintiff's appeal to the Board of Contract Appeals, as modified and adopted by the court, is as follows:

On August 22, 1958, the Department of the Air Force issued an invitation for bids for the construction of 177 military Capehart housing units at Topsham Air Force Station in Maine. The invitation, after setting forth the purposes of the Capehart Act, provided in pertinent part:

> 4. The bidder should carefully examine the provisions of the form of Housing Contract attached hereto, including the Drawings and Specifications made a part thereof; visit the site of the housing projects; and fully inform himself as to all conditions and matters which can in any manner affect the financing of the construction and the constructing of the housing projects or their cost. Should the bidder find discrepancies in, or omissions from, such Drawings and Specifications or other documents attached hereto, or should he be in doubt as to their meaning, he should at once notify the Contracting Officer, Otis Air Force Base, Massachusetts, and obtain clarification prior to submitting a bid. Information given will be transmitted to all known interested bidders.
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> [fol. 203] 5. Under the provisions of Title IV of the Housing Amendments of 1955, as amended, the total principle [sic] amount of the mortgages is limited, among other things to the amount of the bid of the eligible builder. However, the Davis-Bacon Act and Section 212(a) of the National Housing Act as amended require that wages paid to laborers and mechanics be the prevailing wage as determined by the Secretary of Labor not more than ninety (90) days

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[6] See Schultz, *Wunderlich Revisited: New Limits on Judicial Review of Administrative Determination of Government Contract Disputes*, 29 Law & Contemp. Prob. 115, 127 (1964); Spector, *Is It "Bianchi's Ghost"—Or "Much Ado About Nothing"?*, 16 Ad. L. Rev. 265, 289 (1964).

prior to the commencement of construction. Since more than ninety (90) days may elapse from the date of this Invitation For Bids to the commencement of construction, the bids called for by this Invitation For Bids will include a provision for adjustment of the dollar amount therein specified to reflect any difference between the tentative minimum wage schedule attached hereto and the applicable minimum wage schedule as finally determined by the Secretary of Labor. Any such adjustment will be in an amount determined by the Commissioner to reflect such differences, and the amount of the lowest acceptable bid and the FHA estimated total replacement cost of the projects will be amended in the amount so determined by the Commissioner; except that, if such an adjustment would increase the amount of the bid above the amount of any other statutory maximum applicable to the insurable mortgages, the eligible builder will have the option of reducing his bid to such statutory maximum or of withdrawing his bid.

* * * *

8. Each bidder is required to submit with his bid a certified check in the amount of $25,000, payable to the Treasurer of the United States, to insure that if he is the lowest acceptable bidder for the total of 177 family housing units he will perform the necessary preliminary steps and effect a closing with FHA within the time prescribed in the Letter of Acceptability, including the furnishing of an acceptable performance and payment bond. In the event the lowest acceptable bidder fails to effect a closing with FHA within the time prescribed, his deposit will be forfeited and become the property of the Government as damages unless the Department finds that he has made every effort to effect such closing and extends the time to effect such closing. If the lowest acceptable bidder effects a timely closing with the FHA the amount of his deposit will be refunded to him 24 hours after the initial closing with FHA. The deposits of unsuccessful bidders will be returned to them not later than 60 days after the opening of the bids. * * *

[fol. 204] a. "Timely Closing" as referred to in this paragraph of the Invitation For Bids and closing period as referred to elsewhere in these forms is construed to be a period of approximately 60 days from the date of opening of bids.

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12. Bidders are advised that the maximum total of the insurable mortgages may not exceed the lesser of three items being (1) amount of the lowest acceptable bid, (2) FHA Total of the estimated replacement cost of the property or projects or (3) an average per family unit of $16,500 less the estimated value of any usable utilities within the property or projects where owned by the Department or furnished by other than mortgage proceeds. Attention is invited to FHA's Final Appraisal and Eligibility Statements attached hereto. The bidder will be required to pay the fees and costs prescribed in such statements.

* * * *

22. The eligible builder, and all his subcontractors, will be required to pay all mechanics and laborers employed for working directly upon the sites of the housing projects not less than the prevailing wages as determined by the Secretary of Labor. A tentative wage scale is attached hereto. Such tentative wage scale is, however, subject to revision prior to actual start of construction in accordance with Secretary of Labor requirements. For the effect of such revision see paragraph 5 above.

* * * *

Bid Form:

3. The bidder understands that, if this bid is determined to be the lowest acceptable bid, the Department will issue to him a Letter of Acceptability in the form attached to the Invitation For Bids, and the bidder agrees that upon issuance of such Letter of Acceptability he becomes obligated to carry out its terms within the times therein stated, at his own expense, within the conditions of his bid security, and without

further acceptance, award, advice or other action by the Department. Such obligations include an obligation to cause performance by the mortgagor-builder corporations, to be formed by the bidder, of each and every act required of it in the Letter of Acceptability, to cause the execution by said mortgagor-builder corporations of a Housing Contract containing the same terms, conditions, provisions and Drawings and
[fol. 205] Specifications as the specimen form of Housing Contract with good and sufficient surety or sureties as required therein, within the times specified in and in accordance with the Letter of Acceptability.

* * * *

4. The Bidder represents that he is aware of the statutory requirements of Section 212(a) of the National Housing Act, as amended, and of the Davis Bacon Act that wages to be paid to laborers and mechanics employed in the construction of the projects are required to be not less than those contained in the prevailing wage determination of the Secretary of Labor, and that, in order to comply with these statutory provisions, the bid price is subject to increase or decrease by an amount determined by the Federal Housing Commissioner (hereinafter called the "Commissioner") to represent the difference in the "Total Estimate of Replacement Cost of the Total Project," computed according to the wage schedule attached to the Invitation For Bids, and computed according to the wage schedule as amended by the "prevailing wage determination" as that term is defined in Paragraph 19 of the specimen form of the Housing Contract attached to the Invitation For Bids. Moreover, the Bidder realizes that, if the amount of his bid as specified in the Letter of Acceptability, is thereby increased so as to exceed the maximum total amount of the insurable mortgages as determined by the Commissioner, the Bidder shall have the option of reducing his bid to the amount of the maximum total insurable mortgages as determined by the Commissioner, or of withdrawing his bid.

* * * *

8. The bidder agrees that, if issued a Letter of Acceptability, and if he does not exercise the option of withdrawing his bid pursuant to Paragraph 4 above, he will commence the work called for by the Drawings and Specifications within 15 calendar days after the date of closing, and that he will complete the work called for by the Housing Contract as expeditiously as possible, but in no event later than 450 calendar days after date of closing.

* * * *

Attached to the invitation for bids was a tentative minimum wage schedule which contained the following introductory language:

The latest wage determination made by the Secretary of Labor for the country in which the work is [fol. 206] being performed is included herein. The complete determination is incorporated in the contract specifications regardless of whether the Contractor will employ all the classes of laborers and mechanics listed.

The schedule set forth the minimum rates of wages per hour for certain classes of laborers and mechanics, apprentices, building construction personnel, and heavy and highway construction personnel. The rates in the schedule for the heavy and highway construction personnel were lower than the rates for the building construction personnel. The schedule bore an expiration date of September 18, 1958.

There were also attached to the invitation for bids, specifications which defined the scope and situs of the work to be performed.

These specifications included a breakdown into "Section 1 on-site, site preparation" and "Section 2 on-site, Excavation, Filling and Back-filling for Building Construction." Section 1 of paragraph 1-18 of the specifications provided in part:

On Site
Site Preparation

1-18 EXCAVATION, TRENCHING, AND BACKFILLING FOR UTILITIES SYSTEM:

(a) The work consists of furnishing all plant, labor, equipment, appliances, and materials, and in performing all operations in connection with excavation, trenching, and backfilling for utilities system, complete, in strict accordance with this section of the specifications and the applicable drawings.

(b) All excavation for utilities systems occurring within the enclosing walls or appurtenances of buildings or other structures and out to a line 5 feet outside of the walls or appurtenances thereof, is covered under EXCAVATION AND GRADING FOR BUILDING CONSTRUCTION, and is not included under this section of the specifications.

* * * *

Section 2 of paragraph 2-01 of the specifications provided:

2-01 Scope

(a) Work Included. The work covered by this section of the Specifications consists in furnishing all plant, labor, equipment and materials and in performing all operations in connection with excavating, filling, back-
[fol. 207] filling and rough grading, complete for the building and for building utilities lines to a point five (5) feet outside the foundation line, and other related items in strict accordance with this Section of the Specifications and the applicable Drawings, and subject to the terms and conditions of the contract.

(b) Work not Included. Clearing and grubbing, excavation, filling and grading for parking areas, roads, walks, drainage, sewers and other sub-surface utilities systems, and excavation for the building utilities beyond planes five (5) feet outside the building line are not included under this Section of the Specifica-

tions. Stripping of topsoil is specified in Section 1, Site Preparation.

On or about September 30, 1958, plaintiff submitted its bid to construct the housing project at a base price of $2,653,022, with an additional price of $213,071, for certain additive alternatives, or at a total price of $2,866,093. Plaintiff submitted with its bid a deposit, as required by paragraph 8 of the invitation for bids, in the amount of $25,000.

On October 29, 1958, Mr. George S. Robinson, deputy special assistant for installations, Department of the Air Force, sent to plaintiff a "Letter of Acceptability" in which plaintiff was advised that its bid of $2,866,093, for the housing project, including the additives, was the lowest acceptable bid; and, in which, plaintiff was further advised of its obligations to complete a number of arrangements before the "closing" which was scheduled on or before January 8, 1959. The letter of acceptability specified that among the arrangements which plaintiff was to make prior to the closing was the following:

* * * *

n. Make application through the Contracting Officer, Otis Air Force Base, Massachusetts, to the Secretary of Labor for an appropriate wage determination, if necessary, (on a Department of Labor Form DB-11 which will be supplied upon request by the Contracting Officer) for use in the construction of the project, and furnish a copy of such wage determination to the Contracting Officer and the Commissioner. Such wage determination will be used by the Commissioner to increase or decrease the bid price in the manner specified in your bid.

The letter of acceptability also provided in part:

[fol. 208] 2. Failure to perform all obligations prior to the time prescribed for closing will be just cause for cancelling all commitments undertaken with you in connection with the housing project and for the recovery under your bid security of liquidated damages in the sum of $25,000, together with actual damages to the Department, such actual damages to be item-

ized and determined by the Contracting Officer, whose decision will be reduced to writing and furnished to you by mail or otherwise. Such decision shall be final and conclusive unless, within 30 days from the receipt thereof, you appeal in writing to the head of the Department or his duly authorized representative, and his decision shall, unless determined by a court of competent jurisdiction to have been fraudulent or capricious or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence, be final and conclusive. In connection with any appeal under this paragraph you will be afforded an opportunity to be heard and to offer evidence in support of your appeal.

* * * *

6. You are required to be ready for the closing on or before January 8, 1959, and your failure to do so will indicate your inability to carry out the obligations and terms of your bid and this Letter of Acceptability, provided that the Contracting Officer may extend the date of closing in writing upon your submission of written documented proof that the delay was caused by conditions beyond your control.

On November 19, 1958, pursuant to the obligations specified in the letter of acceptability, plaintiff made a request of the Secretary of Labor for an appropriate wage determination. On January 28, 1959, there were issued by the Secretary of Labor two separate wage rate decisions, with expiration dates of April 29, 1959. One of the decisions contained a description of work as "General Construction of 177 family housing units" and set forth rates for laborers and mechanics, apprentices and building construction personnel. The other decision contained a description of work as "Construction of Streets and Roads in connection with Capehart Housing" and set forth rates for heavy and highway construction personnel. As in the instance of the tentative minimum wage schedule which was attached to the invitation for bids, the rates set forth in the wage rate decisions for the heavy [fol. 209] and highway construction personnel were lower than the rates for the building construction personnel.

After receiving the wage rate decisions of the Secretary of Labor, plaintiff concluded that the effect of the decisions was to require it to pay the higher building construction rates for a greater area of the work than provided by the specifications, and that plaintiff's bid price should be increased, in accordance with the letter of acceptability, to reflect the higher rates. In essence, plaintiff's position was that under the specifications it was required to pay the higher building construction rates for work to a point 5 feet outside the building foundation line, and that for work beyond this point it was required to pay only the lower heavy and highway construction rates; but, that under the descriptions of work contained in the decisions it was required to pay the higher building construction rates for all work beyond the above-indicated point, except for work covering construction of streets and roads. Because of difference between the parties arising out of the foregoing decisions, the original closing date of January 8, 1959, set forth in the letter of acceptability, was extended on several occasions while conferences were held by the parties on the matter.

By letter of March 18, 1959, the director of the Federal Housing Administration advised plaintiff that there would be an increase in the wage rates allowed plaintiff in some categories where the promulgated rates had been increased, but that there had been no change in the rates for either heavy and highway personnel or for building construction power operators and that he had not been able to justify an increase based upon plaintiff's interpretation.

On May 29, 1959, following exchanges of correspondence and meetings of the parties, plaintiff requested a determination of the Department of the Air Force relative to plaintiff's interpretation of the pertinent documents from which plaintiff concluded that it was entitled to an additional increase of $85,834 in bid price. By letter of June 26, 1959, plaintiff was advised by George S. Robinson, deputy special assistant for installations, Department of the Air Force, that he did not concur in plaintiff's position. The letter continued:

> If you intend to effect a closing, you should advise me promptly in order that the Letter of Acceptability [fol. 210] may be amended. If you decide not to effect a closing, or advice as to your intention is not withdrawn in 10 days, the letter of acceptability will be withdrawn.

On July 2, 1959, plaintiff wrote to Mr. Robinson that it did not approve of his decision; that, as a result of the delay in the matter, plaintiff had sustained considerable monetary losses; and, that plaintiff was not in a position to set a definite closing date until the matters were resolved.

By letter dated October 1, 1959, Mr. Robinson advised plaintiff that its letter of July 2, 1959, "indicating an unwillingness to set a closing date constitutes a failure on your part to perform your obligations under your bid and under the letter of acceptability." The letter continued:

* * * *

> 3. Accordingly, pursuant to paragraph 2 of the letter of acceptability, the Department hereby cancels all commitments undertaken with you in connection with the housing project, reserving all its rights with respect to the recovery of damages.

By letter dated October 7, 1959, addressed to Mr. Robinson, plaintiff, through its counsel, denied that it had indicated an unwillingness to set a closing date, charged the Air Force with the responsibility for the then existing problems, requested return of the bid deposit, and stated that plaintiff "is reserving all of its rights with respect to recovery of damages due to the failure of the Department of the Air Force to comply with all of the bid instructions and regulations thereby creating the situation that exists."

By letter dated October 19, 1959, Mr. Robinson replied to plaintiff's counsel that the cancellation of the commitments was compelled by plaintiff's "repeated refusals to perform its obligations under its bid and the Letter of Acceptability, with the result that it was necessary to revise the plans and rebid the project," and that the request for the return of the bid deposit was denied. For some unexplained reason, the letter of October 19, 1959, did not

reach plaintiff's counsel, who, prompted by concern that he had received no reply to his letter of October 7, 1959, made inquiry by telephone of defendant on December 4, 1959, and was then furnished a copy of the letter of October 19, 1959, which he received on December 9, 1959. [fol. 211] By letter dated December 16, 1959, plaintiff's counsel wrote to the Secretary of the Air Force as follows:

> As counsel for Anthony Grace & Sons, Inc., I have been requested to appeal the decision of Mr. George S. Robinson dated October 1st, 1959.
>
> On October 7th, 1959, I formally appealed the decision in Robinson's letter dated October 1st, 1959 and in my reply requested the return of my client's bid deposit check and also set forth facts in contradiction to Mr. Robinson's allegations. Hearing nothing further, on December 4th, 1959, I called the office of the Department of the Air Force, and spoke with Mr. Samuel Hanenberg concerning a reply to my appeal dated October 7th, 1959. I thereafter, on December 9th, 1959, received a letter from Mr. Hanenberg wherein he furnished me with a copy of a reply sent to my office by Mr. Robinson on October 19th, 1959. This letter was never received by my office.
>
> You are hereby notified of my intention to appeal the decision of Mr. Robinson to withdraw and cancel the Letter of Acceptability dated October 29th, 1958 and his refusal to return the $25,000.00 bid deposit. I am of the opinion that the facts and circumstances as set forth in my letter forwarded to Mr. Robinson on October 7th, 1959, clearly sets forth that the delays caused by the Government Agencies involved made it impossible for the builder to comply with the terms of the Letter of Acceptability.
>
> In view of the aforementioned, the Letter of Acceptability should have been terminated for the convenience of the Government and the $25,000.00 bid deposit returned to Anthony Grace & Sons, Inc.
>
> I request that this Notice of Appeal, as previously set forth in my letter dated October 7th, 1959 be processed in accordance with the Rules of the Armed Services Board of Contract Appeals. Upon receipt of

Notice of Docketing I will file a formal Bill of Complaint.

I sincerely request that this appeal be expedited in order that a hearing be held at the earliest possible date.

By letter dated December 22, 1959, the procurement contracting officer advised plaintiff that Mr. Robinson had been acting in his behalf in regard to cancellation of the commitments and that he agreed with the action taken by Mr. Robinson.

The letter of December 16, 1959, to the Secretary of the Air Force from plaintiff's counsel was docketed by the [fol. 212] Armed Services Board of Contract Appeals on December 31, 1959. Thereafter, the government moved to dismiss the appeal on the grounds that Mr. Robinson's letter of October 1, 1959, canceling the commitments undertaken with plaintiff, was "an appealable decision"; and, that no written appeal was taken from that letter or from Mr. Robinson's letter of October 19, 1959, within 30 days, as provided by paragraph 2 of the letter of acceptability.

Plaintiff contended before the Board that the letter of October 1, 1959, from Mr. Robinson was not a final decison within the "disputes clause" (paragraph 2) of the letter of acceptability, but that, nevertheless, the letter of October 7, 1959, from plaintiff's counsel did constitute an appeal; that the only correspondence from the government which constituted an appealable decision within the disputes clause was the letter from Mr. Robinson of October 19, 1959, and that since that letter was not received until December 8, 1959, the letter of December 16, 1959, from plaintiff's counsel containing the appeal notice was timely. Plaintiff also contended that Mr. Robinson, the deputy special assistant for installations, who signed pertinent letters on defendant's behalf was not the contracting officer for the purposes of the disputes clause, and that plaintiff had already filed its appeal by the time the contracting officer had, by his letter of December 22, 1959, made his decision.

The Board concluded that the letter of October 1, 1959, from Mr. Robinson constituted an appealable decision and

was at the time so regarded by plaintiff; and that the letter of October 7, 1959, from plaintiff's counsel did not contain "a then present intent * * * to invoke the right of appeal," and, hence, did not constitute an appeal within the disputes clause. Since the December 16, 1959, letter from plaintiff's counsel containing the appeal notice was after the period of 30 days from the October 1, 1959, letter, the Board found that the appeal was not timely. Regarding the status of Mr. Robinson, the Board stated in effect that he had been "the Government's representative in all dealings of legal consequence between the parties," had signed the invitation for bids, the letter of acceptability, and various other pertinent letters, including the letter from which plaintiff contended it had appealed, and [fol. 213] that the contracting officer "was at all times a virtual stranger" to plaintiff.

Accordingly, the Board, on June 29, 1960, granted the government's motion and dismissed the appeal.

In considering the issue of timeliness of plaintiff's appeal to the Armed Services Board of Contract Appeals, it is apparent that the question presented, namely, interpretation of the provisions of the contract documents which set forth the specifics of an appeal and the corresponding interpretation of the effect of letters which allegedly constituted "decisions" and/or "appeals," is a question of law; hence, it and related factual issues are to be resolved independently by the court even though the sole record before the court is the administrative record. *P.L.S. Coat & Suit Corp.* v. *United States*, 148 Ct. Cl. 296 (1960); *Beacon Construction Co.* v. *United States*, 314 F. 2d 501 (Ct. Cl. 1963); *WPC Enterprises, Incorporated* v. *United States*, 323 F. 2d 874 (Ct. Cl. 1963); *Stein Bros. Mfg. Co.* v. *United States*, 337 F. 2d 861 (Ct. Cl. 1963); *Wingate Construction Co.* v. *United States*, No. 394-60 Ct. Cl., January 24, 1964.

The parties are agreed that the governing provisions of the contract documents regarding an appeal appear in paragraph 2, the "disputes clause," of the letter of acceptability which, though heretofore set forth, bears repeating for closer examination, as follows:

2. Failure to perform all obligations prior to the time prescribed for closing will be just cause for cancelling all commitments undertaken with you in connection with the housing project and for the recovery under your bid security of liquidated damages in the sum of $25,000, together with actual damages to the Department, such actual damages to be itemized and determined by the Contracting Officer, whose decision will be reduced to writing and furnished to you by mail or otherwise. Such decision shall be final and conclusive unless, within 30 days from the receipt thereof, you appeal in writing to the head of the Department or his duly authorized representative, and his decision shall, unless determined by a court of competent jurisdiction to have been fraudulent or capricious or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by [fol. 214] substantial evidence, be final and conclusive. In connection with any appeal under this paragraph you will be afforded an opportunity to be heard and to offer evidence in support of your appeal.

In light of the foregoing disputes clause, let us turn to the pertinent language of the letter of October 1, 1959, to plaintiff from Mr. Robinson to determine if there was therein a "decision" which would become "final and conclusive" unless appealed from within 30 days. This pertinent language reads:

* * * *

3. Accordingly, pursuant to paragraph 2 of the letter of acceptability, the Department hereby cancels all commitments undertaken with you in connection with the housing project, reserving all its rights with respect to the recorvery of damages.

A fair reading of the provisions of the disputes clause compels the conclusion that the decision of the contracting officer should include not only language canceling the commitments, but also language setting forth a conclusion regarding recovery of the bid security and itemization of such actual damages which the contracting officer determined should be recovered.

It is clear from the pertinent language of the October 1, 1959, letter that all of the elements of a decision required by the disputes clause are not present, because the only reference to damages (whether liquidated or actual) is that defendant was "reserving all its rights with respect to the recovery of damages." Upon reading this letter, plaintiff could not tell whether defendant had decided to recover liquidated damages, whether defendant was claiming actual damages or in what amount, or even when defendant expected to reach a conclusion as to liquidated or actual damages. Conceivably, plaintiff could have concluded that if there was to be no recovery sought by defendant of liquidated damages or of actual damages, it would be satisfied for the commitments to be canceled and would not appeal; but, plaintiff could not make an intelligent determination on the matter from the contents of the letter. It is concluded that the letter did not constitute a "decision" within the disputes clause, even though, as [fol. 215] defendant points, out, plaintiff in subsequent correspondence did refer to the "decision" in the October 1, 1959, letter. Having reached this conclusion, it is unnecessary to consider whether or not the letter of October 7, 1959, from plaintiff's counsel requesting return of the bid deposit and advising that plaintiff was "reserving all of its rights with respect to recovery of damages" constitutes an appeal, because the letter from plaintiff's counsel of December 16, 1959, which admittedly constituted an appeal was within the 30-day period after the receipt by plaintiff's counsel on December 8, 1959, of defendant's letter of October 19, 1959. It is likewise unnecessary to consider the question raised by plaintiff as to the status of Mr. Robinson, the deputy special assistant for installations.

It is accordingly concluded that plaintiff did make timely appeal and, therefore, did exhaust its administrative remedies, and is entitled to seek relief in this court.

IV

On the foregoing basis, defendant's motion for summary judgment is denied. The case is remanded to the Trial Commissioner for further proceedings in accordance with the court's opinion.

DAVIS, *Judge*, dissenting in part:

I agree with Parts I and III of the court's opinion, but I dissent from Part II. We are required, I think, by the rationale of *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709 (1963), to give the Board of Contract Appeals the opportunity to consider on the merits the issues brought before it by the plaintiff's appeal to that Board under paragraph 2 of the letter of acceptability. The holdings prior to *Bianchi* support the action which the court orders today, but that ruling established new guideposts calling upon us to reappraise our earlier position.

In *Bianchi* the Supreme Court held that, in general, the boards, not the courts, are to be the fact-finders on issues of liability within their contract area of competence. The Court declared, expressly, that the "determination of the finality to be attached to a departmental decision on a [fol. 216] question arising under a 'disputes' clause must rest solely on consideration of the record before the department" (373 U.S. at 714) even where "the administrative record is defective or inadequate, or reveals the commission of some prejudicial error" (373 U.S. at 717). To me that means that, where a board has committed the prejudicial error of refusing a timely appeal,[1] the court should "stay its own proceedings pending some further action before the agency involved" (373 U.S. at 717-18). The essential principle is that, wherever possible, the evidence appropriate to an issue of liability under the Disputes clause should be taken by the board rather than the court. Certainly, a board, told by this court that it was wrong to dismiss an appeal as untimely, would undertake to hear and consider the case on its merits. We cannot assume otherwise; but if the board did continue to refuse, "the sanction of judgment for the contractor would always be available to the court" (373 U.S. at 718).[2] The delay in now having a hearing on the merits

[1] Such a case is also one in which "the department had failed to make adequate provision for a record that could be subjected to judicial scrutiny" (373 U.S. at 718).

[2] In this instance there is no reason to think that the Board will reject the appeal on grounds other than untimeliness. The Board

before the board will not necessarily be any greater than in now having a trial on the merits before our Commissioner. Even if it is, the rationale of *Bianchi*, as I understand it, gives predominance to the finding of facts (on the issues of liability) at the administrative level.

Since *Bianchi*, this court has tried contract issues of fact for itself (*i.e.*, factual questions arising from a controversy within the Disputes clause) only where the remaining problem was solely one of damages and the board had not considered or taken evidence on damages, [fol. 217] or the amount of recovery, because it had decided against the contractor on the merits. See *Stein Bros. Mfg. Co.* v. *United States*, Ct. Cl., No. 389-59, decided July 12, 1963, 337 F. 2d 861, and succeeding cases. That line of decisions, with which I agree, rests on the clear demarcation between issues relating to liability and those concerning the measure of recovery. That distinction has been embodied in our own rules (Rule 47(c)), is found at many other places in the law, and represents an established and convenient boundary which can appropriately continue to be utilized after *Bianchi* to dispose of a tag-end issue of amount of recovery. But in my view it trenches upon the Wunderlich Act, as interpreted in *Bianchi*, to extend the same rule to instances in which a board refuses to decide the merits of a case because it errs as to its jurisdiction, the timeliness of an appeal, or some similar threshold question. Under *Bianchi*, the board should decide the merits of the cases properly before it. If

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clearly has jurisdiction over the claim for return of the bid deposit. It will not, under its consistent practice, pass upon the correctness or the validity of the determination by the Federal Housing Administration adjusting the bid price after the Secretary of Labor issues a new wage determination. Nor will the Board review the correctness or the validity of the Labor Department's wage determination. The Board can, however, pass initially upon other issues involved in plaintiff's appeal. For instance, the Board can consider the crucial question of the correctness of plaintiff's interpretation of the contract plans and specifications—as they bear upon the wage determinations. The Board can also pass upon the meaning of the wage determinations. If plaintiff's interpretations are erroneous, there is clearly no basis either for recovery of the deposit or for damages. If those interpretations are correct, other issues may be presented.

it makes an error in that respect, it does not lose jurisdiction or the court gain it exclusively. After the court corrects the error, it should let the controversy on the merits proceed before the board until the facts have been properly determined.

Neither *C. J. Langenfelder & Son, Inc.* v. *United States*, Ct. Cl., No. 291-63, decided Feb. 19, 1965, 341 F. 2d 600, nor *H. B. Zachry Co.* v. *United States*, Ct. Cl., No. 332-61, decided April 16, 1965, is a precedent for what the court does today. In both, a contracting officer failed to decide an issue. Since the contract impliedly requires a reasonably prompt determination, a refusal to decide is a serious breach of the contract, entitling the contractor to bring suit to redress the failure. In those circumstances the contractor need not further pursue his administrative remedies before commencing an action. But the court did not hold in either case that, once suit had been begun, the facts on which the merits of controversies (within the Disputes clause) are to be resolved should not be presented to, and found by, the boards but are for this court alone. In *Langenfelder*, the court based its factual findings on the administrative record before the board. In *Zachry*, the court was not asked to stay proceedings to allow a board to determine the facts; the dictum that the plaintiff was excused from pursuing his administrative reme- [fol. 218] dies was coupled with an express refusal to decide that the board had any jurisdiction over the matter.[3] Neither decision, in my view, supports the court's present ruling.

On the other hand, the refusal to suspend proceedings to allow the Board to consider the merits of plaintiffs' appeal is directly contrary to the recent, and unanimous, position of the court in *Utah Constr. & Mining Co.* v. *United States*, Ct. Cl., No. 3-61, decided Dec. 11, 1964, 339 F. 2d 606. The Board of Contract Appeals had dismissed the contractor's appeal, on the "concrete aggregate

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[3] It makes a difference, too, that in such cases the contracting officer frustrates the entire administrative process, at its outset, by refusing to make any determination. A legal error by an appellate board, after facts have been found by the contracting officer, is different in character.

claim" in that case, on the ground of untimeliness. The majority of the court specifically ruled that if the claim was not for breach of contract but within the Disputes clause—and if the Board was wrong on the timeliness of the appeal—then the evidence on the merits should *not* be taken in this court but "we should suggest to the board that it consider it [the claim] on the merits and suspend proceedings here until it has a reasonable opportunity to do so." Slip op., p. 10, 339 F. 2d at 613. My separate opinion agreed with that position. Slip op., p. 19, 339 F. 2d at 618-19. The Chief Judge concurred in the result. Now the court overrules that unanimous portion of *Utah Construction.*

LARAMORE, *Judge,* joins in the foregoing dissenting opinion.

[fol. 219]

[Clerk's Certificate to foregoing transcript omitted in printing.]

[fol. 220]

SUPREME COURT OF THE UNITED STATES

No. 439, October Term, 1965

UNITED STATES, PETITIONER

v.

ANTHONY GRACE & SONS, INC.

ORDER ALLOWING CERTIORARI—November 8, 1965.

The petition herein for a writ of certiorari to the United States Court of Claims is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1966 798535 482